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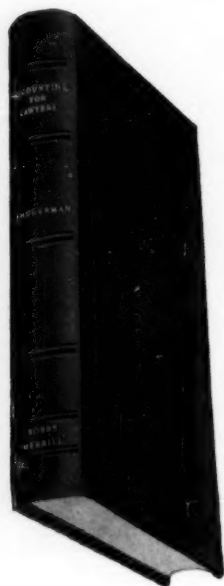
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American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are sixteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of thirty-six, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are \$12.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are \$3.00 per year, and for three years thereafter \$6.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. The dues for all other Sections are \$3.00 a year, with the exception of the Section of Taxation, which are \$6.00 a year.

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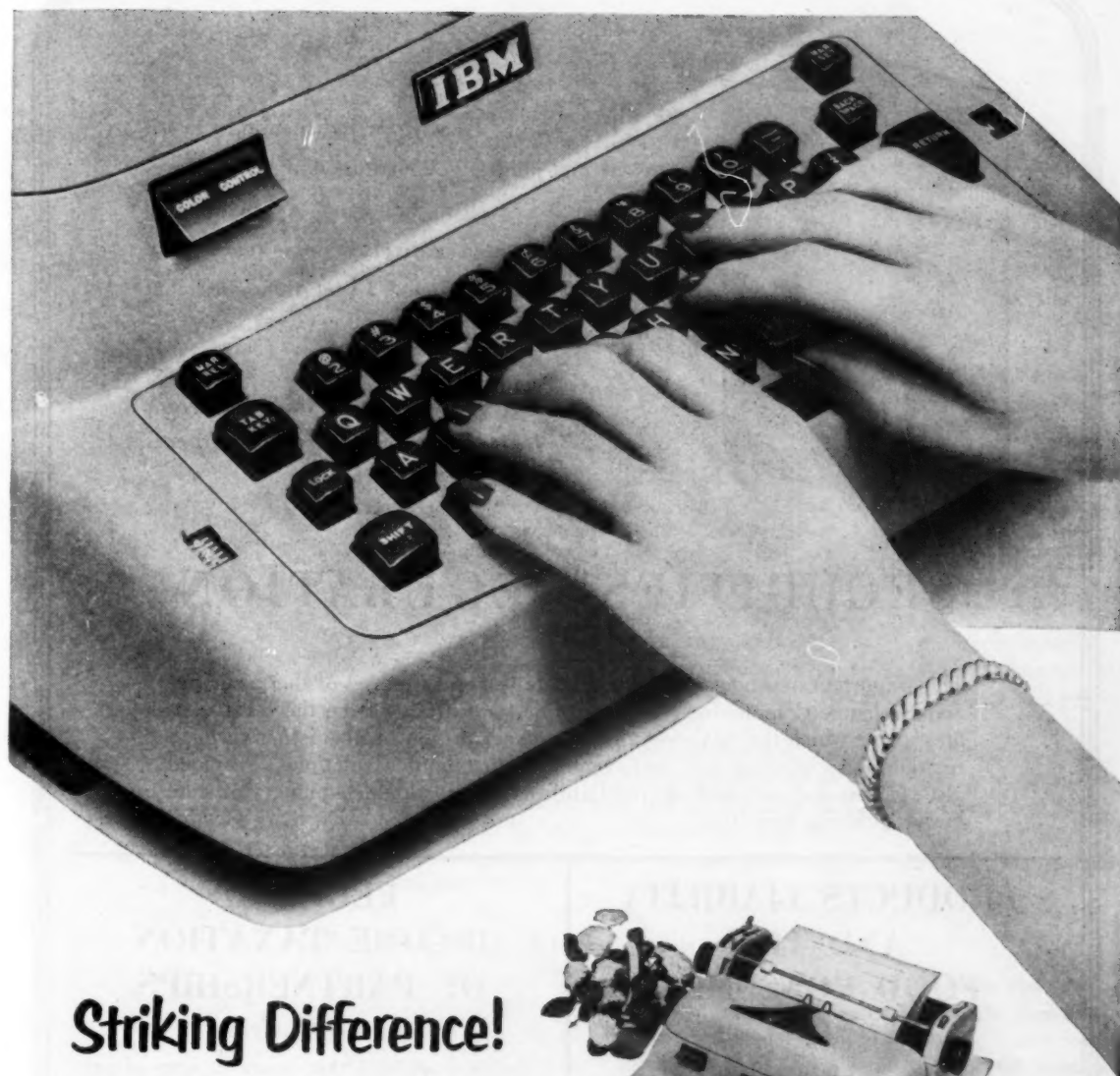
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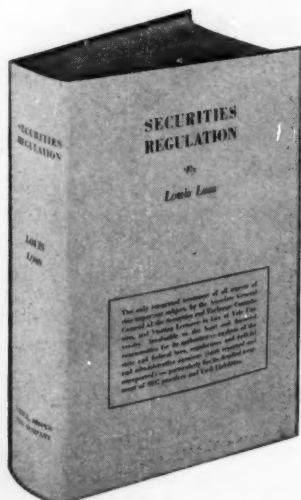
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CURRENT OUTLOOK

American
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★

February 1952

● Lawyers should have security, too

The American Bar Association has successfully resisted all efforts to subject lawyers to the provisions of the Social Security Act. Yet, inflation and taxation have destroyed much of the opportunity that lawyers once had to save for their old age and for death benefits for their families. A new Senate Bill has just been introduced which may have the effect of bringing lawyers within the Act.

George Roberts, Chairman of the Committee on Retirement Benefits for Lawyers, is of the opinion that the House Ways and Means Committee will give a full hearing in the coming session of Congress to interested groups of self-employed persons and partners on the Reed and Keogh Bills, H.R. 4371 and 4373, embodying the principles approved by the House of Delegates for permitting such persons to exclude 10 per cent but not to exceed \$7,500 from taxable income annually to the extent paid into a private retirement fund.

Our correspondence indicates that countless local bar associations are interesting themselves in whether the Ways and Means Committee will report favorably to the House on these bills.

Mr. Roberts also happens to be chairman of a committee comprising representatives of a large number of organizations of self-employed persons, including doctors and farmers, who are vitally interested in the enactment of this taxation principle. He will address the Conference of Bar Association Presidents at Chicago, February 24, on the current status of this American Bar Association legislation.

● Public opinion of lawyers can be corrected

The Public Relations Committee is on the last lap of the tenth draft of its "Public Relations Manual for State and Local Bar Associations", so that it can go into publication for distribution at the Mid-Winter Meeting.

Thomas L. Sidlo, of Cleveland, Chairman, and Joseph M. Hartfield, member of that committee, have been working with the moving picture industry toward depiction of the lawyer in screen plays with increased fidelity. This has resulted in the deletion of considerable material which has constituted an unfair or inaccurate portrayal.

They mention that the moving picture companies are anxious to get good stories about the courts and the profession and that such suggestions will get attention if forwarded to Headquarters. Do you know of such a story that has not been filmed recently?

● The American Bar Association accepts a Christmas gift

Burdette Smith Company and the West Publishing Company have made a gift to the American Bar Association for the office of its Director of Activities, at Chicago, comprising the entire *United States Supreme Court Reports*, the *United States Supreme Court Digest*, the *United States Code Annotated*, *Words and Phrases* and their recently completed work on the *Federal Rules* and on *Federal Practice and Procedure* by Barron and Holtzoff. This gift was offered by R. E. Dokmo, President of Burdette Smith Company and Harvey T. Reid, the President of West Publishing Company, expressly without obligation and in the interest of the public and the profession. It has been so accepted on behalf of the American Bar Association with thanks by the President and Administra-

tion Subcommittee of the Board of Governors. The Director of Activities likewise, expresses his own gratitude. The active lawyers who are attached to the Headquarters Staff now have available for the first time the nucleus of a working library. This new resource will be increasingly used and appreciated by the entire staff of the American Bar Association and its *Journal*, as well as by its officers and members.

● United we stand

One of the most potentially powerful groups in the world came into existence with the organization two years ago of the Conference of Bar Association Presidents, of which Richard P. Tinkham, of Hammond, Indiana, is now Chairman. Following that pattern and led by Ohio, Pennsylvania, New York, Illinois, Michigan and Iowa, many of the state Bars have been sponsoring the organization of permanent conferences of local bar association officers in each state.

Louisiana held its first such conference for two days on January 11 and 12 at Alexandria, Louisiana, hearing Walter J. Suthon, Jr., President of the integrated Louisiana State Bar Association, Glenn R. Winters on "Local Bar Activities", and Richard P. Tinkham on "Public Relations for the Bar". Ohio's Conference has been meeting twice a year. Some of these conferences are limited to presidents. Some have permanent constitutions.

Thus, local associations ascertain their common needs and problems and state bars find new ways to activate, strengthen and serve their local groups, by which they are themselves made stronger.

● A recommended model disciplinary procedure is a possibility

Generally, the profession is extremely selfless and effective in policing offenders against its canons, as promulgated and interpreted by the American Bar Association. Much is being done to make the public conscious of the fact that such offenses in themselves are very rare.

Yet, failure or inability to punish even one such offense creates so much bad public opinion of the whole Bench and Bar that disciplinary procedures have been under constant improvement for generations. Much more remains to be done in this difficult field before the public will be widely confident that the profession has done all that humanly can be done to maintain uniformly high standards of professional conduct.

Because a lawyer can only be disciplined for ethical infractions by the court which admitted him, the practice and rules vary widely for initiation of the complaint, its investigation, and trial and recommendation by the bar association or other body to whom that court may have confided such original jurisdiction. There is equal variation from state to state in the courts themselves as to methods and policy of review and disposition.

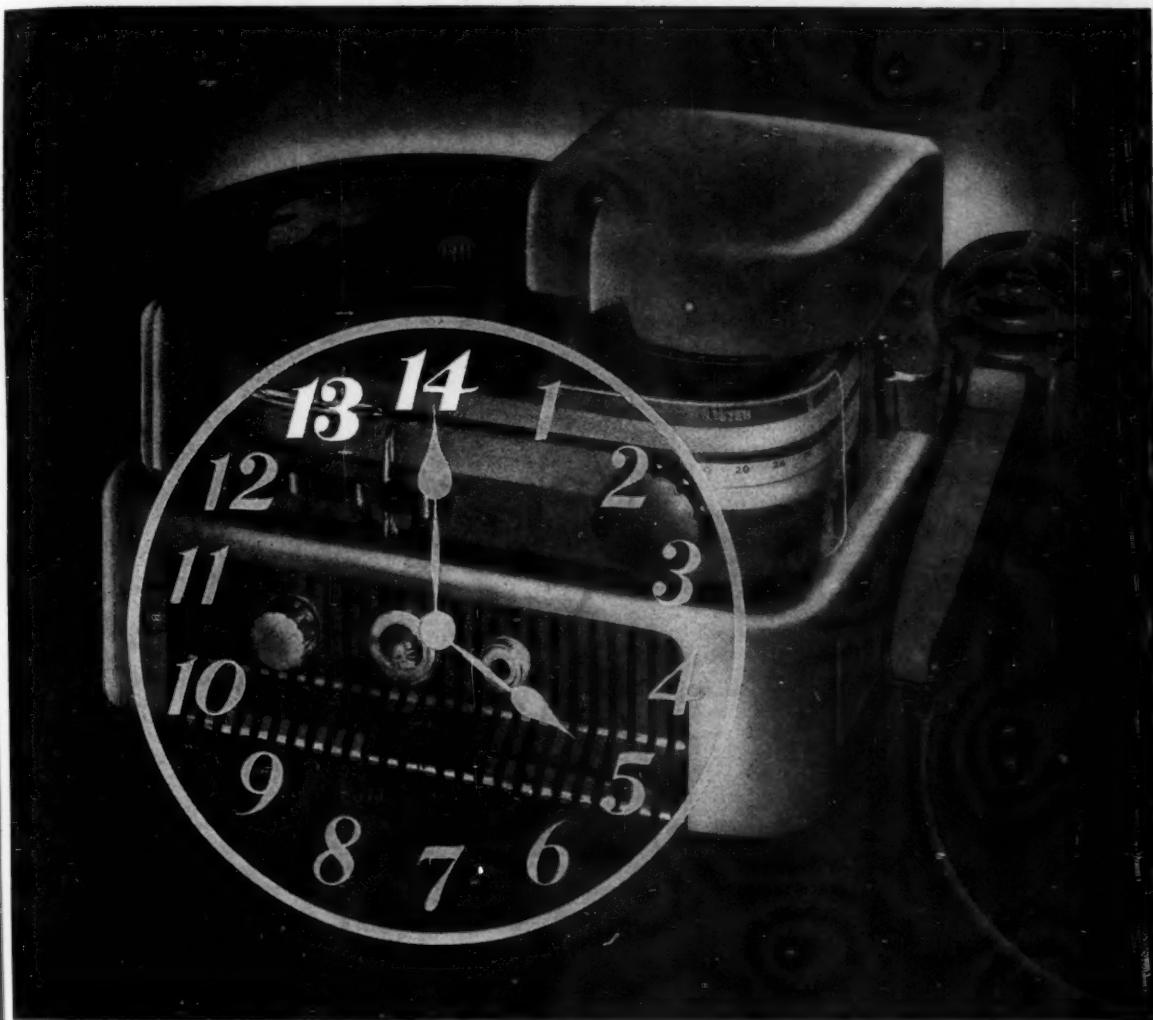
Few associations follow a practice of initiating their own complaints. Fewer still have adequate investigatory resources to obtain essential proof that is so often not furnished by complainants. The integration of some Bars has provided substantial gains in these respects, but in one large integrated Bar, an accused lawyer is given a jury trial as in a criminal case. The medical profession has some strong disciplinary techniques.

With this perspective, the Board of Governors has asked the Standing Committee on Professional Ethics and Grievances for advice as to any possibility and method of developing recommended or model inquiry and disciplinary procedures embodying standards which will insure effectiveness, in collaboration with the Conference of Chief Justices, the Conference of Bar Association Presidents, the Commissioners on Uniform State Laws and other bodies.

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1. (a) Name _____ (Please print)
(b) Office address _____ City _____ Zone _____ State _____
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9. Are you now or have you ever been a member of the Communist Party? _____

10. Have you ever been subjected to discipline by any court or bar association for unprofessional conduct? _____

11. Are any complaints now pending against you? _____

12. If your answer to any of the last three questions (9, 10 and 11) is in the affirmative, give complete details and any explanation you desire on a separate sheet.

I hereby apply for membership in the American Bar Association and, if elected, agree to abide by its Constitution and By-Laws and its Canons of Professional Ethics.

Date _____ (Signature) _____

ENDORSEMENT

(By a member of the Association)

I hereby certify that I know the above applicant and that in my opinion the applicant is qualified for membership in the Association.

(Signature) _____ (Address) _____

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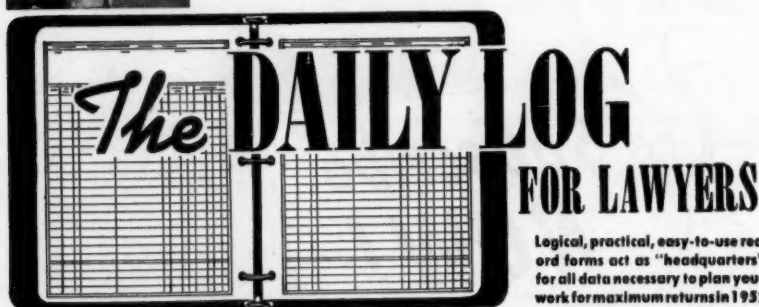
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INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted:

On or before April 1, 1952.

Amount of Prize:

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Subject To Be Discussed:

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Eligibility:

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No essay will be accepted unless prepared for this Contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

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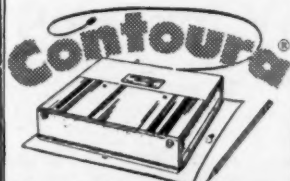
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Some Reflections on the Judicial Function:

A Personal Viewpoint

by **Harold R. Medina** • Judge of the United States Court of Appeals for the Second Circuit

■ Respect for the Bench is one of the traditions of the Bar, but perhaps for most of us that respect sometimes has a tinge of envy, especially when a well-fought legal battle has just been decided against us, wrongly of course, by an able judge who ordinarily would know better. Here Judge Medina recalls his own reactions when his appointment to the Bench of the Federal District Court in New York gave him the opportunity of putting his own judicial theories into practice. His account of how he broke some of his resolutions and how he kept others is both entertaining and rewarding. This was an address delivered before the Section of Judicial Administration's Annual Dinner in honor of the Judiciary of the United States on September 18 at the Waldorf-Astoria.

■ In many ways it is a pity that I should have left the United States District Court just as I was beginning to get broken in. Those four years have passed so quickly and yet, as I look back, they seem almost like a lifetime. A few months ago a judge from Ohio dropped in to see me at my chambers. Just as he was leaving he remarked: "How do you get all these good cases?" Well, I am sure that I did nothing to "get" any of them, but there was one which pretty nearly "got" me. And as for the anti-trust suit now in its eighth month and just swinging into action, I can truthfully say that I shall be only too happy to trade it in at any time for a couple of dozen automobile accident cases.

Anyway, these four years have seemed a long, long time. Just as is the case with every lawyer when he goes on the Bench, I have learned a lot and I have had many surprises. You know how it is—when a lawyer of some experience becomes a judge,

he knows that he has a lot to learn, but he is also full of notions about what he thinks judges ought to do and what he thinks judges ought not to do; and it is amazing how, with a little experience, he finds that most of his notions about judges are wrong. It is one of the really interesting things in life to see how different law administration looks from the counsel table on the one hand and from the Bench on the other.

From the day I donned my judge's robe until this very moment I have been experiencing one surprise after another. And so I shall use the recital of some of these surprises as a sort of rhetorical device in the hope that by discussing them in what is perhaps the inverse order of their importance, I may get over to you a few ideas which cut pretty deep.

It might be better and more fitting for this occasion if I were to talk about legal philosophy but, really, I am not so sure but that the things I shall discuss, while seemingly very

mundane and matter-of-fact, may not at bottom amount to the discussion of legal philosophy. But I am no legal philosopher and make no pretense on this score. I only say *quaere!*

Do Lawyers Persuade Judges?

In the early part of my career at the Bar most of my time was taken up in the writing of briefs and the argument of appeals; and I have in my files at least a dozen or more copies of speeches by the judges of various appellate courts on the subject of the writing of briefs and the making of the oral argument on appeal. Whenever such an address was announced, I always went up to listen and I noticed that without exception, as far as I can recall, these learned jurists stressed the subject of preparation, accuracy, brevity and the clarification of the issues presented by the various appeals. But when it came to the art of persuasion, I thought I detected a very definite and almost universal notion that the function of the lawyer ceased with the clarification of the question, a discussion of the authorities and a comprehensive and absolutely accurate statement of the facts. None of these judges seemed willing to admit that a mere lawyer had ever persuaded a judge to decide a certain way when the judge, if left to himself, might well have decided the contrary.

Some Reflections on the Judicial Function

And so my surprise No. 1 came when I discovered that the lawyers were doing this very thing to me and I want to confess it openly and to say that in my judgment that is one of the things a good lawyer is supposed to do. I do not mean that I am bamboozled into deciding wrongly—although that could be. I merely wish to admit that the cogency of a lawyer's argument, the skill and ingenuity with which he built up his propositions in logical sequence and the research he brought to bear upon his presentation of the case really did much more than merely clarify the issues and then leave the case for me to decide. After all, as I view the administration of American justice, it is a co-operative effort in which the best results are obtained by the interaction of the minds of the court and counsel and it is silly to suppose that the judge loses any of his dignity or authority when he admits that the art of persuasion still flourishes.

Right here let me drop in a sort of philosophical footnote. Suppose we ask ourselves the question: Assuming that at least some judges hate to admit that a lawyer has argued them into deciding a case on a certain theory, why does the judge act this way? Perhaps he is beginning to get an exaggerated notion of his relative importance in the general scheme of things. I don't say he is; I only say *quaere*.

This reminds me of something my wife started in on before the Senate had even confirmed my appointment as District Judge. Every time I thought I was winning an argument she would say: "Don't be judgey! Don't be judgey!"

After all is said and done, we cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. And if he once begins to believe it, he is a lost soul.

Judges Suffer from Unjust Criticism

I think the second surprise came when I discovered how the judges

suffer under the lash of unjust criticism. I used to think that a judge had a hide like a crocodile and that you could call him all kinds of names and criticize everything he did in the best American style but that it all rolled off his back like water off a duck. Criticizing judges seemed to be a sort of favorite indoor sport among lawyers, much of it in a semiserious vein, and it furnished a lot of laughs and amusement.

But I soon found that it is one thing to be an advocate at the Bar with the power to strike back and defend oneself and a very different thing to be a judge who, according to our traditions of judicial propriety, must remain silent under the most unjust and the most unprovoked attacks.

I do not say that I think judges are above criticism. Indeed, I think quite the contrary. It will be a sorry day for the United States if judges ever come to be considered little tin gods on wheels with power to strike down those who criticize their conduct or their decisions. But I do say that I was mightily surprised when I found how a judge felt when the press or the commentators or the Congressmen or the average man in the street chose to take a crack at him.

I never shall forget the personal attacks that were made on Chief Judge John C. Knox by the Communist lawyers for his extraordinarily fine work in building up the jury system in the United States District Court for the Southern District of New York. His every effort to eliminate from the general jury panel persons wholly unfit to serve on juries was branded as willful discrimination against the workers and against people of various races and conditions.

Now that the Communist case is over, people are apt to forget that in the early stages there was talk of my impeachment for administering justice with an even hand and refusing to decide the jury challenge without a full and fair hearing of both sides. Some of those who castigated me in their editorials for be-

ing too easy with the Communists and their lawyers must feel a little sad now that it is all over and everyone can see what a spectacle I should have made of myself had I failed to administer justice in that case just as it should be administered in any other.

And how about the Supreme Court? As soon as a man takes his seat there he almost instantly and automatically becomes a target for the most unfair sort of abuse. I suppose they get philosophical about it, but some of the magazine articles and short stabs by newspaper and radio commentators are pretty bad.

Of course it's a free country and everyone knows that the judge must take it all with good grace and a smile; but I wish to raise my small voice in favor of a little moderation in such things and in favor of criticism with something constructive about it and not mere mud-slinging for the sake of raising a laugh. It may be all right, but I say: *quaere*!

Do Judges Read the Advance Sheets?

Then there was another surprise which was perhaps the greatest of the lot. When I was a young lawyer just out of law school, I used to read the advance sheets with meticulous care, clipping out headnotes and portions of opinions and keeping them classified in a big scrapbook. Then, when I got started on my bar examination classes, it seemed as though a goodly part of my time was taken up, week in and week out, reading advance sheets, *New York Law Journal* opinions, digesting cases and so on. And finally when the press of my professional work made it impossible for me to continue my teaching career, I said: "Thank goodness I am through with those advance sheets. I never want to see another one of those again."

But when I got on the District Court I saw these advance sheets piling up and the slip sheets coming from the Supreme Court and our Court of Appeals. I went around to one of the other judges and said: "What do we do about these ad-

vance sheets? "Oh," he replied, "to hell with them." "Well," I said, "at least we read one another's opinions, don't we?" And he said, "Don't be silly." I thought to myself, "What kind of a court is this?"

Now what I am working up to is that, to my utter surprise, I found that I had a glorious time writing opinions. I never thought this would be so. I would prepare a draft and then fuss with it and perhaps write out another draft or two and finally file it. Then I would read it over again when it went to the West Publishing Company and when the proof came back it would look even better. But I still gave it another careful perusal as it appeared in the advance sheets and again when it appeared in the bound volume. Of course no one else seemed interested except the lawyer who lost. Counsel for the winning side would simply look at the end and see that he won. But the one person you could always depend on to go over the opinion with a fine-tooth comb was the lawyer who lost, as he would try to find some basis for a successful appeal.

Anyway, this opinion writing has a perfect fascination for me. Part of the joy is that no one can make you put in something that you want to leave out. Naturally, this greatly simplifies the process.

I remember when I was a young law clerk working in one of the big law offices here in New York. Several of us boys were working on the different points in a brief and we got all of them in pretty good shape except one which related to the Statute of Frauds. We went in together to report to the member of the firm in charge of the case and said that we just could not figure out any answer for that point. "Oh," he said, "that is easy." And he took the brief and, without making a separate point of it, added the following words in the conclusory paragraph: "The Statute of Frauds is obviously inapplicable." We didn't think much of this until the opinion of the Court of Appeals came down and there to our utter amazement we found repeated the words "The Statute of

Frauds is obviously inapplicable."

I wonder if you feel the edge of the knife here, "the harpoon" as I used to call it in my teaching days at Columbia Law School, as some of those here doubtless remember. Is it all right to remain absolutely silent on some thorny law question which has been vigorously debated by counsel on argument? Or isn't it? And how much is hidden away beneath brief "per curiam" and "affirmed without opinion" cases? Do these have any bearing on the philosophy which underlies the judicial process? Or must the discussion of legal philosophy always be couched in metaphysical terms only understood by the initiates and having to do with everything under the sun except what is happening in court every day?

Surprise No. 4 still has me puzzled. When I became a judge I thought I had worked on just about every kind of case known to man or beast. The factual backgrounds, of course, were different, but the hundreds of appeals that I argued in various appellate courts covered a pretty wide range and I felt that all this experience was going to prove very helpful. What was my amazement to find that in the entire four years of my experience as a district judge I seemed always to be working on something that I knew absolutely nothing about. Patent cases, admiralty cases, special issues formulated by the Supreme Court, regulations of the Securities and Exchange Commission and the Interstate Commerce Commission, interpretations of the Wage and Hour Law, the Portal-to-Portal Law and so on and so on.

Must a Judge Be Expert on Law Applicable to the Case?

And the peculiar part about all this is that as soon as the lawyers heard that I knew nothing whatever about the law applicable to the case, each side leaped with joy. Sounds crazy, doesn't it? But that is just what they did. I suppose every lawyer is hopeful that when he has an important case of some complexity he will have a chance to plow virgin soil with full opportunity to sell his ideas



New York Times Photo

Harold R. Medina has been on the Second Circuit Bench since June 28, 1951. Admitted to the New York Bar in 1912, his distinguished career has included extended active practice, teaching and writing, and years of service in the work of the organized Bar. In addition to his many current interests, he is Chairman of the Association's Section of Judicial Administration.

to the judge and not run into any preconceived notions or whimsies.

Please pardon me if I add another philosophical footnote. Fundamentals are truly wonderful things. But I wonder if fundamentals are not sometimes lost in the maze of rules, exceptions and miscellaneous cryptic utterances which inevitably develop in many fields of the law. Isn't it just barely possible that a highly skilled technician in a particular specialty might be led astray by his own virtuosity? How about some of the highly-touted masterpieces of modern art? Even a violin player might be tempted to add a few little runs of his own, the totality of which would change the whole complexion of a concerto. Perhaps a judge, highly skilled in the manipulation of the refinements of the patent laws might yield to the temptation to do what practically amounts to the same thing and come out with a fantastically absurd result.

Incidentally, I once made a speech entitled "A New Judge Tries His First Patent Case". Some people

seem to think I was arguing in favor of a separate court to hear patent cases. But I wasn't. All I was trying to do is the same thing I am trying to do this evening, namely, give everyone a few laughs and at the same time something to think about. If I ever decide to advocate a separate court for hearing patent cases, which I am pretty sure I shall never do, you can rest assured that my listeners will know what I am up to.

Some Good Resolutions Are Forgotten

Now we are getting pretty close to the end. As a lawyer I formed a lot of good resolutions about what I should do and what I should not do if I ever became a judge. And they were pretty good resolutions, too; but I soon found that in the realm of human affairs there are no absolutes. Beware of the man—or the woman either—with a will of adamant who says that he will never, never do thus and so and who sticks to his resolution through thick and thin and wholly irrespective of any new and unforeseen circumstances. I had resolved that I would listen to the lawyers till the cows came home, but I found that this was a physical impossibility. I resolved that I would never under any circumstances blackjack people into a settlement. But I did. And I even got to fussing around over what the Court of Appeals or the Supreme Court would do with my judgments, although I had solemnly determined that of all the things a trial judge should not do that was positively the worst.

I stuck fairly well to some of these resolutions but they were all pretty well battered and beaten by the time

my four years were up and I want to tell you here and now with the utmost sincerity that some of the things that I am proudest about in my record as a district court judge are the times when I broke my resolutions. And so we come to the last of the lot.

I never had the slightest conception of the fervent love for the administration of justice that exists in the hearts of the American people from one end of this great country of ours to the other. And perhaps I never should have realized it but for that mass of letters I got when the trial of the Communists was over. The average person you meet in the subway, or on the street, seemed to realize by some process of intuition that it was not proper, according to our American traditions to write to a judge and try to influence him to rule one way or another in a case pending before him. But when they did write after the trial was over it was just as though the word "America" had been written across the face of every one of those letters. It seemed as though these thousands upon thousands of people knew that our American heritage could only be preserved by the dealing out of even-handed justice between the litigants, wholly irrespective of their race or condition or the seriousness of the charge against them. What this great mass of so-called "little people" have sense enough to realize is that our liberties and our way of life can only be preserved by a calm, unemotional and dignified running of our judicial system by men of loyalty and sincerity who call them as they see them coming over the plate.

Please don't misunderstand me. I am under no illusions about myself.

What I did was no different from what would have been done by any other of our hundreds of American judges, state and federal. What I am stressing as significant is that these people in such great numbers should think these thoughts and give expression to them.

And that is how I discovered that the people of America truly love their judges. They honor and revere their judges and hold them close to their hearts. Never forget this; and never let them down. And remember too that the so-called "little fellow", who really is America in the aggregate, doesn't like judges who shout at him or bang their gavel, and he doesn't like to be kicked around.

It has been a great experience to learn these things. It has strengthened my confidence, which throughout the years has never wavered, in the strength and vitality of this great country of ours. I stress those words "strength" and "vitality". It is always the fundamentals which turn the scales.

Perhaps you may have detected a note recurring every now and then in these remarks of mine. I shall now try to make it more audible.

I rather suspect that my experience on the Bench has been pretty much the same as that of the rest of the judges here, including the august and distinguished Chief Justices who grace this banquet with their presence. Sitting there from day to day with that grand old flag just over one's shoulder really does something to you. Above all it teaches one humility, the greatest quality a judge can have.

And so I say "Don't tell me the United States of America is going to the dogs. I know better."

Security for the Professions:

A Plan for Equitable Tax Treatment—A Reply

by M. Francis Bravman • of the New York Bar (New York City)

■ In the June, 1951, issue of the *Journal* (37 A.B.A.J. 409), we published an article by Nathaniel L. Goldstein, of the New York Bar, urging adoption of the so-called "Silverson Plan" for eliminating the inequitable tax treatment of the professional man by allowing him to postpone payment of tax on part of his income during the years of his greatest earning power. At the September meeting of the House of Delegates, the Association gave its approval to the Silverson Plan by endorsing two bills pending in Congress which, in effect, would make that plan part of our federal tax scheme. This article presents another proposal for handling the inequity. Mr. Bravman, who is Chairman of the Section of Taxation's Committee on Taxation of Earned Income, states his reasons for opposing the plan advocated by Mr. Goldstein and explains the "income-averaging" plan which has gained support in respectable quarters since the Silverson Plan was first proposed.

■ Doctors, lawyers, engineers, architects and most other professional men must spend many years in acquiring their education. They then face many more years in acquiring the experience, the training and the clients that will permit them to earn an adequate income.

If they are competent, and fortunate, they may begin to earn a good income by the time they are 45 or 50. As prudent men, however, they must realize that in another fifteen or twenty years their income will begin going down again and that it behooves them to set aside something for their old age.

But they are not able to do so because of high taxes.¹ These men are at a definite disadvantage as compared with taxpayers whose total income during their lifetime has been the same but spread more uniformly over the years. The latter pay a smaller amount of income taxes than those with fluctuating incomes.²

Moreover, employed individuals may, under existing law, exclude from their income the contributions

their employers make for their benefit to a retirement fund. Self-employed individuals, however, are not permitted, under existing law, to exclude from their income any amount they may set aside for their future. Because of this discrimination in the tax law it is also claimed that self-employed individuals are less able to provide for their retirement.³

To remedy this situation Nathaniel L. Goldstein, Attorney General of the State of New York, in the June, 1951, issue of the *AMERICAN BAR ASSOCIATION JOURNAL* (37 A.B.A.J.

1. The present tax burdens compel everyone, regardless of the amount of income, to work a disproportionate amount of each year for the Government. A young man starting out in life with no dependents and an income of \$2,000 per year must pay \$269.00 of it to the Federal Government. He works for the Government about one-eighth of his time. He makes his way up the ladder to \$5,000 and marries; his federal income tax is \$728.00. He is now working for the Government about one-seventh of his time. After he has two children, the tax is still \$461.00.

Suppose he is industrious and successful. His salary goes up to \$10,000. The Government takes \$1,630.60 of it. If he can increase his earnings to \$25,000, the Government's share is \$6,794.00. In other words, although he increased his gross income by \$15,000, he can keep only \$9,836.60 of it. He works for the Government not one-eighth

or one-seventh but about one-fourth of his time.

The man with \$50,000 net income pays about 42 per cent of what he makes to the Government and the man with \$100,000 net income about 56 per cent. Moreover, the man with \$50,000 net income has only \$11,036.00 more to spend than the man with only \$25,000 net income. By increasing his income to \$100,000 he gets only \$15,101.00 more free money than if he were receiving \$50,000.

2. The penalty imposed upon individuals with widely fluctuating incomes is illustrated by the chart below. It is assumed the individual is married, has no dependents, and files a joint return. It is further assumed the Internal Revenue Code, as amended by the Revenue Act of 1951, is applicable.

3. Silverson, "Earned Income and Ability To Pay", 3 *Tax L. Rev.* 299 (1948).

COLUMN A. Net income before exemption	COLUMN B. Aggregate tax on Column A net income received in two successive years.	COLUMN C. Tax on twice Column A net income received in one year	COLUMN D. Percentage excess of tax Column C over Column B
\$ 1,200.		\$ 216.	
2,000.	\$ 272.	538.	98
3,000.	676.	961.80	42
7,000.	2,419.20	3,134.	30
15,000.	6,948.	9,671.	40
25,000.	14,636.	21,550.	47
50,000.	43,100.	56,557.	31
100,000.	113,114.	138,936.	30

A Plan for Equitable Tax Treatment

409) proposed that the Internal Revenue Code be amended to

(1) Allow the taxpayer to exclude from gross income in any taxable year prior to attaining age 65 an amount invested in special United States Government bonds.

(2) Limit the amount which may be so invested in any one year to \$10,000 or 15 per cent of earned net income in the practice of his profession, whichever is less.

(3) Provide that the bonds shall be nonnegotiable, nonassignable and shall not bear interest.

(4) Permit the bonds to be redeemed only upon attainment of age 65 and at any time during the life of the taxpayer thereafter or at death.

(5) In the event of death, either before or after age 65, permit the bonds to be redeemed by the estate within a period limited to five years.

(6) Require inclusion of the proceeds of the bonds in the gross income of the taxpayer or of his estate, as the case may be when redeemed, and exclude such bonds unredeemed at death from the estate tax.⁴

Mr. Goldstein states that such a plan "would permit the professional earned-income taxpayer to avoid the unfairly onerous effect of high surtaxes upon him by a method which will automatically average out his income⁵ within limitations effectuating the primary purpose of enabling professional men to achieve the measure of security now denied [them] or the impact of such surtaxes".⁶

Concededly the inequity in the tax should be removed by equalizing the tax burden among all individuals, whether professional or not, who earn the same aggregate income over the same period of time. Equality, however, is not attained by the plan recommended by Mr. Goldstein. Moreover, his plan would benefit a few, create inequities among others and leave the basic problem unsolved.

Mr. Goldstein's Plan Benefits Only a Few

Under Mr. Goldstein's plan⁷ tax benefits are granted to those professional men who are able to set aside *permanently* a portion of their income, but denied to those who are unable to so set aside a portion of

their income. Thus those who require the relief most are denied it, while those who need it least receive it. For example, Mr. Goldstein's plan would not benefit professional men who are unable to set aside permanently a portion of their income

1. Because they are already making payments to an insurance company toward the purchase of an annuity contract;

2. Because they are already paying premiums to an insurance company on policies insuring their lives, which policies may be converted for their cash surrender value into an annuity contract when the insurance protection is no longer required;

3. Because they are making payments toward the purchase of a home which will be fully paid for when they retire;

4. Because they are accumulating a fund with which to enter a business or profession;

5. Because they need surplus income to expand their existing business or profession; or

6. Because they are unable to save any part of their income, all of which is required to cover their current living expenses.

On the other hand, Mr. Gold-

stein's plan would permit professional men whose earned net income is so large that after providing for all their needs there is still a sufficient amount left over for them to set aside for their retirement.

It is also apparent from the foregoing illustrations that Mr. Goldstein's plan would create an inequity between professional men who have equal incomes in a particular year.⁸ For example, professional men having the same income for a particular year pay different sums because those who have the largest surplus available, after providing for their personal affairs, would see to it that they pay less tax for the particular year than those professional men with the same income who are not free to choose how their income should be spent. Thus, if there are a number of professional men each with an earned income of \$20,000, the heaviest burden of taxation falls on those with the least surplus income.⁹

Mr. Goldstein's plan would not solve the basic problem which is the elimination of the inequity created by a tax imposed upon the annual net income.¹⁰ This problem has been previously recognized by the Con-

4. Goldstein, "Security for the Professions: A Plan for More Equitable Tax Treatment", 37 A.B.A.J. 409, 411 (1951).

5. This is not true. The plan would merely enable the taxpayer to shift a portion of his income from one taxable period to another.

6. See note 4, *supra*, at pages 411-12.

7. The plan was first proposed by Mr. Silverson. Statement of Harry Silverson, Hearings before Committee on Ways and Means on Revenue Revisions (1947-48), 80th Cong., 1st Sess., Part 3, 1699 et seq. It is also the subject of two bills, one, H.R. 3456, introduced on April 2, 1951, by Representative Coudert and the other, H.R. 4371, introduced by Representative Keogh on June 7, 1951. Mr. Silverson would extend the plan to all individuals and permit redemption of the special government bonds at any time. Mr. Goldstein would restrict the application of the plan to professional men and permit redemption of the special bonds after attainment of 65 years of age. Mr. Coudert's bill (H.R. 3456) would permit self-employed individuals to exclude from their gross income 15 per cent of their "earned net income" (which would include "wages and salaries") or \$10,000 whichever is the lesser. Mr. Keogh's bill would permit all individuals, whether self-employed or not, to exclude from their gross income 10 per cent of their "earned net income" or \$7,500 whichever is the lesser, minus any amounts contributed during the taxable year by an employer of the taxpayer to a pension trust or toward purchase of an annuity contract. Under both bills the amount excluded from gross income would have to be contributed to a "restricted retirement fund"

under which no payments could be made to the individual until he arrives at 60 years of age.

8. The objections to the plan stated in this article are equally applicable to the Silverson plan and to those embodied in the Coudert and Keogh bills. The latter two have the additional disadvantage in that they involve an immediate loss of revenue to the Government.

9. For example A and B each have an income of \$20,000. A, who is married but without children is able to set aside 15 per cent or \$3,000 of his income by investing it in the special government bonds or by paying it into the "restricted retirement fund". B, who is also married but with two children, must devote all his income to cover his current living expenses including premiums on ordinary life insurance policies, premiums on endowment policies to provide for his children's education, mortgage payments on his home, etc. Under the income exclusion plans A with one dependent pays \$604.00 less tax than B with three dependents. It is true that A will pay a tax on the \$3,000 excluded from his current income when he retires but the claim is made that he will be in lower tax brackets at that time than when the income was earned. A will also have the accumulated income on \$3,604.00 which may equal or exceed the tax he eventually will pay on the excluded income.

10. See note 2, *supra*. Also see Bravman, "Equalization of Tax on All Individuals with the Same Aggregate Income Over Same Number of Years", 50 Cal. L. Rev. 1 (1950); Bravman, "Integration of Taxes on Capital Gains and Income", 37 Va. L. Rev. 527 (1951).

gress and various provisions have been added to the law to mitigate the inequity in particular situations. For example:

1. Individuals are permitted to spread over the period of service compensation received for personal services rendered over a period of thirty-six months or more.¹¹ But individuals who receive lump sum payments for personal services performed over a period of more than a year and less than three years cannot spread the compensation. If, however, they are able to procrastinate and thereby stretch the period of service to thirty-six months they effect a tax saving.

2. Individuals are permitted to carry-back one year or to carry-forward five years a net operating loss.¹² Individuals who sustain a net business loss are thus able to reduce their taxes but the amount of reduction will vary among taxpayers according to what the income happens to be in the particular year to which the loss deduction is carried, although for the period as a whole the net business results are the same for all of them.

3. Individuals are permitted to report income on an installment basis.¹³ Individuals who sell property to persons with good credit can so arrange the transaction that they pay a lower tax than individuals who sell like property at the same profit to persons with poor credit.

4. Individuals are permitted to exclude from their incomes amounts contributed by their employers pursuant to a pension plan for the benefit of the employees.¹⁴ Employed individuals who are beneficiaries of a pension fund thus are able to save taxes because a portion of their income is shifted from the year it is earned by them to the year or years it is paid to them after they retire. Other employed individuals whose employers do not contribute to a pension fund for their benefit and all self-employed individuals thus pay a higher tax than beneficiaries of pension funds who have a like amount of income in a particular year.¹⁵

5. Individuals who receive "back-pay" or recover "bad debts, prior taxes, and delinquency amounts" are permitted to restore all or part of such amounts to the year the back pay was earned or the bad debts, prior taxes, and delinquency amounts were deducted,¹⁶ but an individual who is required to return a portion of his income earned in a prior taxable year cannot go back and recompute the income of such year.¹⁷

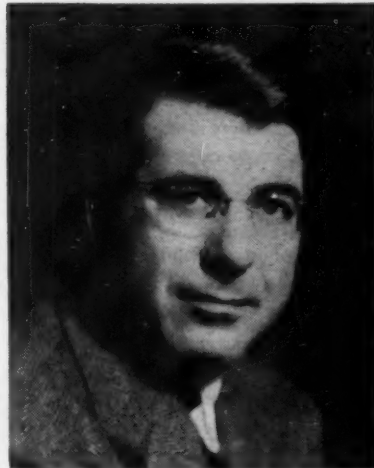
6. Individuals are permitted to report income on a cash or accrual basis of accounting.¹⁸ Tax results differ because of the use of one method rather than the other.¹⁹

7. Individuals are permitted to report their income on a calendar or fiscal year basis.²⁰ The use of the fiscal year permits some individuals to shift their income to a taxable period other than the one in which the income was earned.²¹

Special Provisions Have Not Solved Problem

The special provisions referred to have not solved the problem because individuals are required to pay a tax based upon the taxable income computed for each year as though it stood by itself unrelated to other years. This affects adversely all individuals with widely fluctuating incomes. Those in the lowest brackets may lose the full benefit of their personal exemptions and allowable deductions by failure to have an income equal to them in a given year and those in the higher brackets will be taxed at greatly varying rates. In either case, the result is that individuals with highly irregular incomes are required to pay substantially more federal income tax over a period of years than those who receive an equal aggregate income ratably during the same period.²²

Here is a picture of unequal taxation of individuals who have the same income in a particular year or over the same period of time, a picture made worse by a constant rise in the amount of tax imposed upon them. If nothing is done to remove these inequities in the tax, individ-



M. Francis Bravman is a graduate of New York University and of the Harvard Law School. A member of the New York Bar, he practices in New York City. He is the author of several articles in the field of taxation.

uals will continue to be under strong pressure to average out their income by whatever means are available to them. In addition to the methods already mentioned, other devices are used, such as deferred compensation contracts under which individuals are paid compensation over a period extending beyond the period of service, or tax loss sales are entered into for the purpose of offsetting gains, etc. If a device is not available, the Congress is asked to provide one, such as the plans recommended by Messrs. Silverson and Goldstein or those embodied in the bills introduced in this Congress by Messrs. Coudert and Keogh. All such requests, if granted, would merely add a number of provisions to an already

11. I.R.C., §107.

12. I.R.C., §122.

13. I.R.C., §44.

14. I.R.C., §523(p) and 165.

15. I.R.C., §§11, 12, and 182.

16. I.R.C., §522(b)(12) and 107(d)(1).

17. *United States v. Lewis*, 95 L. ed. 448 (1951).

18. I.R.C., §§41, 42 and 43.

19. See Bravman, "Equalization of Tax on All Individuals with the Same Aggregate Income over Same Number of Years", 50 Col. L. Rev. 1, Note 4 (1950).

20. I.R.C., §41.

21. See Bravman, "Integration of Taxes on Capital Gains and Income", 37 Va. L. Rev. 527, 530, Note 16 (1951).

22. See Note 2, *supra*.

complicated revenue law, make the taxpayer's activities more dependent on the tax law and leave unsolved the basic problem which is the elimination of these inequities created by a tax imposed upon the annual net income.

Proposed Solution Would Change Tax Base

The recommended solution is to change the tax base by permitting individuals to average their income for extended periods of time. Such a provision in the law would benefit everyone regardless of his ability to save or to set aside a portion of his income for his retirement and regardless of the time the income is earned or received by him. Averaging of income would have the added advantage of simplifying the computation of income and of the tax since such a provision would eliminate existing provisions in the law designed to mitigate the effect of taxing income on an annual basis.

The difference between Mr. Goldstein's plan and the averaging plan is that under the former income is not taxed at the applicable rates when earned but, presumably, at lower rates when received after retirement, while under the averaging plan income is taxed at the applicable rates when earned and the excess tax, if any, is subsequently refunded or credited to the individual. Moreover, Mr. Goldstein's plan confuses two problems (1) equalization of the tax burden and (2) encouragement of the individual to provide for his retirement. His plan, however, would not achieve either of these objectives except that a relatively few, those with surplus income, would be encouraged to set aside a portion of their income in order to save taxes. On the other hand, averaging of income would equalize the tax burden among all individuals with the same income over the same period of time and leave them free to provide for their retirement in such manner as their circumstances permit, whether by contributing to a retirement fund or by purchase of annuity or life insurance contracts,

United States savings bonds or a home or by establishing a business or profession, or by any other means. The size of the retirement fund would be measured by the success of the individual and his habits of saving and not by the amount of tax he could save or the amount he could set aside permanently in a manner specified by the Government.

When the Ways and Means Committee held its hearings on revenue revisions in 1947, averaging of income was proposed by the Chamber of Commerce of the United States,²³ the American Federation of Labor,²⁴ and the Associated Actors and Artists of America, an international union affiliated with the American Federation of Labor.²⁵ Averaging of income was also proposed by Eric Johnston in November, 1949, on behalf of the Motion Picture Association of America when he, as President of the Association, testified before the House Judiciary Subcommittee studying monopoly power.²⁶ With such general agreement on the need for averaging of income one would wonder why it is not a part of the tax system. The obstacle has been the lack of a practical method which would produce a constant flow of revenue, allow payment of the tax when the individual is able to pay and equalize the tax burden between individuals with fluctuating incomes and individuals with stable incomes.

A Simple, Practical Plan Is Available

A simple and practical method of basing the tax on the actual average income is available. Under this plan individuals would be permitted to

average their incomes earned during minority; from 21 through 30 years of age; from 30 through 55 years of age; and from 55 years of age to death.²⁷ The computation of the tax or refund is simple. The individual would compute the tax on the average income exactly as he does now on his net income.

The average income for any year of the averaging period would be computed in the return for that year. Reference to the records for all years of the averaging period would not be necessary, for the average income of the preceding year and the number of preceding years in the averaging period would be carried forward from the preceding return. The income for the current year would be added to the product of the two items carried forward and the sum divided by the number of years in the averaging period. The result is the average income for the taxable year.

A simple schedule included as part of the tax return furnished by the Treasury Department would enable the individual to compute his tax or refund under the plan. The form (see page 171) would appear on the return. It also contains figures illustrating the plan.

In the example it is assumed the individual is married, has no dependents, and files a joint return; it is the tenth year of averaging with the average income for the preceding (ninth) year being \$25,000 and the net income for the current (tenth) taxable year being \$50,000. It is further assumed that since averaging was begun, the brackets of

(Continued on page 170)

23. Statement of Laurence Arnold Tanzer, Hearings before Committee on Ways and Means on Revenue Revisions (1947-48), 80th Cong., 1st Sess., Part 3, 1556, 1557.

24. Statement of Arthur A. Elder, *id.* at 1418, 1420.

25. Statement of Thomas N. Tarleau, *id.* at 1711 *et seq.*

26. Statement of Eric Johnston, November 16, 1949.

27. Some limitations on the right to begin or to continue an averaging period would appear to be necessary in order to avoid reversing the equities against the Government. Obviously, it would be unfair to permit an individual to have a single averaging period from the time he first begins to earn income to the time of his death. A division

of his lifetime into representative periods would be necessary. The first division, naturally, would be the minority of the individual. The next division could be the period during which the individual completes his training and acquires his real earning capacity. The third division could be those years in which the individual has his peak earnings. The last division would be the remaining years of his life. It is, therefore, suggested that, until some experience with averaging has been gained, an individual should be permitted at his election to average his income received or accrued (a) during his minority; or (b) from the time he reaches majority to the time he reaches 30 years of age; or (c) after he reaches 30 years of age to the time he reaches 55 years of age; or (d) after he reaches 55 years of age to the time of his death.

Public Relations Programs of the Bar:

An Analysis of the Problem and the Solution

by George Maurice Morris • of the District of Columbia Bar

■ This article is a report prepared for the Survey of the Legal Profession.

The Survey is securing much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

Reports are released for publication in legal periodicals, law reviews, magazines and other media as soon as they have been approved by the Survey Council's Committee on Publications.

Thus the information contained in Survey reports is given promptly to the Bar and to the public. Such publication also affords opportunities for criticisms, corrections and suggestions.

When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions and recommendations.

■ When one speaks of a "public relations program" he has reference to some plan or design for affecting the attitude, or opinion, of some group of people (or people generally) with respect to some individual, collection of individuals or institution. In recent years such plans or schemes have sprung up in almost every field of human relationships. The imaginations of the members of the legal profession have been stirred by this activity.

As an individual, the lawyer, from the dim beginnings of his profession, has given careful attention to the people's opinion of him. The opinions which the members of his community have of his character and talents have been vital to his economic and social program. He has cultivated those opinions both "on duty and off". Indeed, so great have been the inducements to advertise his virtues that restraints, in the in-

terests of the dignity of the profession and the minimizing of litigation, have long been imposed upon him by his professional brethren. The means and the channels through which he may publish his merits and solicit patrons are limited by his codes of ethics.

The lawyer has always had, and will always continue to have, an uphill struggle to win universal acclaim. The reason should be obvious. Lawyers, most of them, live by controversy. It is their job to advance one side of disputes. Usually the people on the other side, particularly if it be the losing side, emerge with no vast affection for opposing counsel. Persons who employ the services of a lawyer are sometimes heard to swear by their own lawyer and refer to others as "shysters". The lawyer may know how to "influence people" but in the game of "winning friends" the cards are somewhat stacked against him.

Yet, there is an anomaly which accompanies this condition. In relatively recent times, with the accelerated activity of associations of the Bar, the public has come, increasingly, to have a respect for the organized Bar. This is reflected in such remarks as "That fellow ought to be reported to the bar association. They'll knock his ears down", or "Why don't you go to the bar association? They will advise you what to do." The lawyer as an individual may be suspect, but the purposes and actions of the organized Bar are respected.

Members of the profession who have been devoted to building and directing bar associations have taken ideas from their success. Many of them would capitalize, in the interest of the lawyer, on the growth of public respect for their societies. Those members reason that if more members of the public were made aware of the good works of these groups credit would be reflected on their personnel. Seeing and hearing the efforts put forth by the medical profession, the dentists, the bankers and others, to win greater popular favor, the organization-minded lawyers have asked themselves why they, also, should not get into the business of "educating the public".

Publicity being so obviously the channel through which information is spread and publicity being something which money can buy, the

lawyers who cry for "action" on a public relations program almost automatically turn to the media through which publicity may be obtained. This results in buying advertising space in press and periodical, time over the radio and television, and in the distribution of printed pamphlets. Sometimes friendly institutions such as trust companies and banks have been induced, in their advertising, to point out the usefulness of the lawyer to the community. As the lawyers' interest in better public relations for themselves has grown, material of this sort has come from units of the organized Bar throughout the United States.

Publicity Stresses Value of Lawyer's Services

Most of this kind of effort has been directed to educating the reader, or listener, as to the economic value to him of the lawyer's services. The prospect is told some specific things that a lawyer does. Instances where the timely employment of a lawyer would have avoided trouble and loss are recited. Similar instances where the employment of a lawyer resulted beneficially to his client are pointed out. Some groups have published slogans. Typical of these are "See your lawyer first", "Better have a lawyer than be sorry", etc. This advertising has been dignified in tone, persuasive in reasoning, sometimes eye-catching, sometimes humorous, but always in good taste.

Because of two factors, first, the lack of funds and, second, the very great difficulty, almost impossibility, of measuring the returns, this advertising has generally been nonsustained and, at best, sporadic.

Many members of the Bar, particularly the larger experienced, have not been overenthusiastic about these efforts. Their reluctance to having lawyers advertise as a group when they may not do so as individuals has been largely overcome by the restraint and good taste of the "copy", but they still have reservations. Their attitude seems to be that, in the long run, people will be val-

ued at their true worth and that worth will be longer remembered if it is not self-proclaimed. There is something here of the view of many businessmen before large expenditures for advertising became a recognized expense of conducting most businesses seeking general public custom.

The national organization of the profession, the American Bar Association,¹ and some of the larger state units, such as those in California and Michigan and other states, have proceeded rather cautiously. They have tried to "get their arms around" the many problems before getting too deeply involved in commitments.

There are a number of questions which appear to require answering and a variety of policy decisions which would seem to be desirable before a public relations program of a hoped-for lasting character should be undertaken.

It would seem sensible, for example, to determine, at the outset, in whose interest a public relations program is to be operated. That is, should the program be dedicated primarily to gaining public acceptance of the organization which finances it, the individual members of that organization, of all the members of the profession in the area served by the organization, or lawyers as a class?

Who Is To Be Reached by Public Relations Program?

Who are the people whose attitudes toward the profession, or the lawyer, are to be improved? Whose opinion is to be influenced? Is the program to be directed at potential clients, "persons of influence", legislators, judges, writers, journalists, radio commentators, or all comers? Do you want to use a shotgun or a rifle; or sometimes one and sometimes the other?

What do the persons whose opinions are to be influenced think of the lawyer, or the lawyers, before the campaign begins? It seems fairly obvious that a planned undertaking to change anything should include a reasonably accurate knowledge of

the condition, at the start, of what one is going to change. Virtually all "counsellors in public relations" require a "survey of existing opinion" as a starter. This not only affords a sort of psychological target at which to aim but also a base from which to measure one's progress. Surveys made by the Bar Associations of Iowa and California are illustrative of such undertakings.

Let us assume that the initial survey shows the lawyers, in the opinion of the people chosen to have their ideas changed, to be wanting in some respects. What are the planners of the campaign going to do about these ideas of deficiencies? Suppose that substantial numbers of people have said that a poor man cannot get a lawyer, or that a man of small means cannot get a good lawyer, or that lawyers do not give as good advice on some subjects they are supposed to know about as do some persons who are not lawyers. How is the bar association, sponsoring the improvement drive, going to treat these opinions? One cannot, to his credit, answer such comments by merely pointing out that it is generally wiser to have a lawyer's advice than not to have it.

One of the ways, even in these days of "superselling", to get a reputation for being honest, able and public-minded, is to demonstrate, by deeds, that you are honest, able and public-minded. Advertise your merits, if you like, but make sure that you hold to the first principle of advertising, i.e., "See to it that the goods live up to the copy."

Among the reasons that the bar associations have gained in public respect is that they have forced higher standards for admission to the Bar and have policed the profession with growing vigor. They have worked at improving the administration of the courts, they have campaigned for the election or appointment of qualified judges and they have struggled to harness and direct that growing giant, administrative procedure. They have spoken

1. See Report of the Special Committee on Public Relations, 71 A. B. A. Rep. (1946), pages 258-269.

out, in nonpartisan fashion, on issues where men's partisanship has made their utterances suspect. The bar associations have fought, under the handicap of being charged with self-interest, the unauthorized practice of the law. During World War II, the bar associations set up a system of legal assistance to persons in the Armed Services and their families which surprised, in its efficacy, virtually every beholder.

Organized Legal Aid Usually Found Only in Larger Cities

This latter activity gave new heart to those members of the profession who have felt that a lawyer's service should be available to any man and every man. While the lawyers, as have the physicians and surgeons, always have given their services to the indigent, *organized* legal aid for the poor has generally been a phenomenon of the larger cities. It has been something of a task to get the lawyers of smaller communities to accept the idea that making lawyers' advice and help available to everyone in the community is the concern of the legal profession above all other groups. This gospel is spreading; it could spread faster.

More recently this sense of the lawyers' obligation to society has developed "the lawyer reference plan". This is the device which is now widely known and growing rapidly, wherein the bar association of a community undertakes to advise persons of limited means (frequently too ignorant or too frightened of expense to go directly to a lawyer) the names of lawyers, known to the bar association to be qualified, who will, for a fee made known in advance, advise the inquirer as to his rights and the courses of action he may pursue.

Another aspect of this campaign to make the lawyers' services available to everyone has been the sponsoring of "neighborhood law offices" by bar associations. This idea is to give encouragement to lawyers to open offices primarily designed to serve the underprivileged, in parts of the community where the lawyers manning the offices will be more

quickly available to persons who have had little or no prior acquaintance with lawyers. The movement to have statutes setting up "public defenders" for all persons charged with crimes or misdemeanors and without means to retain their own counsel, is another aspect of this growing feeling in the profession that the lawyers themselves should make sure that there is a lawyer for every man.

Public Esteem for Profession Will Grow with Public Service

When lawyers' services do become available to all people, regardless of their economic circumstances, and all people know that those services are available to them, one has the feeling that a foundation will have been laid from which good will and esteem may expand and continuously grow. When the lawyers are able to educate themselves to the point where they always do a better job, in the fields where laymen would compete with them, than such an unauthorized practitioner can hope to do, more people will have respect for the lawyer than are now reported to have.

In short, there appears to be a healthy self-analysis among the members of the Bar which has accompanied their desire to have the public realize how good they are. This self-analysis has resulted in steps toward curative action. The action seems to be well designed. In any event, it appears to be a very necessary ingredient to a public relations program.

There is a final aspect of these public relation efforts of the profession which appears to require reference in any survey of this field of professional endeavor.

The units of the organized Bar, like all voluntary enterprises not dedicated to financial gain, are inherently cramped for want of funds. Those groups have not yet discovered any ways for earning substantial income. They are almost wholly dependent upon moneys received from their individual members in the form of dues and donations. In the so-called integrated-bar states, where every lawyer must pay an



George Maurice Morris was admitted to the Illinois Bar in 1915; since 1919 he has practiced in Washington, D. C. He was Chairman of the House of Delegates, 1936-1938, Chairman of the Section of Taxation, 1939-1942 and President of the Association 1942-1943. He is the author of several books and various articles on taxation.

annual fee to the bar association of his state if he wishes to retain his license to practice, income may be more certain than in those jurisdictions where membership is optional. The optional membership obtains in most states and in the American Bar Association. In either situation, however, the total receipts are limited. As a result there is a competition among the association's workers for the appropriation of much greater amounts of money than the association ever has available.

The implementation of a public relations program, even with all the volunteered time a bar association's members make available, costs "serious" money. It has been a common phenomenon in the organized Bar to find a membership sold, to the point of enthusiasm, on a public relations campaign. But when the cost of a "director" or manager (of the experience and earning power indicating the ability to do a good job), clerical assistance and equipment, printing and mailing expenses, a "public relations counsel", and the purchasing of advertising space

or time, get piled on top of each other, spirits and feet cool. Three alternative results follow: (1) the whole project gets shelved "for the time being"; (2) the membership votes to "give it a whirl" and, when the whirl is over, being unable to measure results in tangible terms, abandons the effort; (3) the organization induces someone with a spirit of dedication, patience and tenacity, to take on the job of being "director" of the association's program. He must be prepared, underpaid, understaffed and underfinanced, to do the best he can.

Public Relations Is No Job for Amateurs or Unpaid Workers

Virtually everyone who has made a serious study of a plan for an affirmative program to improve the public relations of a bar association and its members soon learns that it is no job for either amateurs or the financially

uncompensated. He learns, further, that the changing leadership of our organized Bar enterprises makes it exceedingly difficult to achieve that continuity of aim, methods and management which an effective public relations campaign demands. An enterprise for profit may get some reflection, in its sales figures, of its public relations efforts. It at least enjoys the benefits which arise from the expanding experience of the continuing management of the business. Organizations of volunteers, unless they are in reality operated by a large staff of trained and continuing personnel, seldom are able to capitalize on the experience of their members. Command shifts too frequently. Bar associations usually fall in that unbenefited category.

By way of conclusion, it may be said that the lawyer has an inherent handicap in the achievement of anything approaching universal esteem.

Oddly enough, however, his efforts for public good, when he is a member of an organized unit of his profession, have been winning a respect for his group which may someday accrue to him as an individual. The efforts of the bar associations to achieve a continuous planned campaign to affect public relations have had rather sporadic try-outs, have possibly suffered from an incomplete analysis of the targets and objectives of such a campaign and, like most projects of such associations, have suffered from a want of funds for the purpose.

The situation, however, is not one for discouragement. Both the quality and the acceptance of the quality of what the lawyer has to offer the community is improving. If that improvement continues, the techniques of spreading knowledge in the community of the merits of that product should not be too hard to master.

Progress Made in Pretrial Program

■ When Judge John J. Parker in 1938, as Chairman of the Section of Judicial Administration, constituted committees of experts to report on particular phases of the administration of justice, he included the subject of pretrial procedure, then a new development in the procedural field. The excellent report of that committee, headed by Judge Joseph A. Moynihan of the Circuit Court of Detroit, is still an admirable short text on the subject. The report started out with the following paragraph:

Recognition of the high duty of the Bench and the organized Bar to hear and heed the voice of public interest by eliminating delay and unwieldiness in certain aspects of the judicial process has in recent years led to many far-reaching procedural innovations. Perhaps none of the new developments has greater potentialities for serving the public good than has the plan of a pre-trial hearing of each case by the Court. An examination of the general purposes and the mechanics of this device is the object of this report.

This and other reports rendered at the time were adopted by the American Bar Association and became a part of the national program of the Section of Judicial Administration whose aim it was to implement the recommendations through committees on improvement of the administration of justice in every state. The program has gone forward since that time with some outstanding accomplishments to its credit and the progress made has been summarized in the book *Minimum Standards of Judicial Administration* edited by Chief Justice Arthur T. Vanderbilt of New Jersey and published in 1949. In addition to its use in the federal courts which was brought about through the adoption of Rule 16 in the Federal Rules of Civil Procedure, the book reports that the use of pretrial conferences was authorized at that time either by rule or statute in twenty-nine states. Since that time several more states have been added.

But the promulgation of a rule

or the adoption of a statute authorizing pretrial procedure does not of itself bring about the establishment of the pretrial conference as a regular feature of judicial procedure and the fact is that pretrial conferences are called in the majority of the cases in less than half of the federal district courts while in not over a dozen states is the regular use of pretrial reported in metropolitan state courts where its employment would be expected. The problem of the Pretrial Committee of the Judicial Administration Section, working in conjunction with the Pretrial Committee of the Judicial Conference of the United States, has been to publicize the use of the procedure to show its flexibility and to advertise its advantages to the Bench and Bar. This work has been carried on through articles and speeches on the subject but mainly through demonstrations from actual cases of how the pretrial conference is conducted. In this work Judge Alfred P. Murrah

(Continued on page 136)

Corporation Support of Education:

The Legal Basis

by Laird Bell • of the Illinois Bar (Chicago)

■ Most Americans would agree that our private schools and colleges are a fundamental part of the private enterprise system we want to maintain. For many years these institutions have been supported by individual citizens who gave generously to their favorite colleges, but this source of income for the schools is diminishing, thanks to changing economic conditions by which small businesses owned by individuals are being replaced by large corporations. At the same time, increasing costs have made it necessary for the colleges to find more funds to carry on their programs. Mr. Bell addresses himself to two phases of this problem: the legal difficulties involved in a corporation's giving financial support to schools from its stockholders' funds and the problem of how to aid some institutions without incurring responsibility to many more.

■ The altruistic impulses of corporations that are in excess profits brackets have been greatly stimulated by the new tax bill. And the question of the legality of contributions to various eleemosynary institutions is likely to land in the lap of counsel.

It will be easy for counsel, if not charitably inclined, to bring forth the well-worn formula that the directors have no right to "give away" the stockholders' money. But the formula has worn a little thin—at least what constitutes giving away is being redefined. It can be safely said that no reported case in recent years has held that it was a giving away when benefit to the corporation from a contribution could be shown. And the definition of what constitutes a benefit has been increasingly expanded as the practice of giving has grown. Moreover, with excess profits dollars being worth only 18 cents to the stockholder, statistically only 19

cents worth of present or future benefit from a \$1 contribution is necessary actually to improve the stockholders' situation.

Many needy charities are prepared to help corporations determine an appropriate benefit. Some purposes are obvious, like Community Chests and local hospitals. This article is concerned with the benefits to be obtained from contributions to education, which may at first blush seem not so obvious.

Corporations and their shareholders have a stake in higher education. Higher education is important to them in the matter of markets—an educated public and a high standard of living go hand in hand. It is important in the matter of a supply of future executives. It is important in the development of products and processes. And it can no longer depend on the charity of private individuals struggling under current tax loads.

Even before the present inflationary influences had been felt, increased costs had overstrained many worthy institutions. Maintenance men working around on campuses have been demanding more take-home pay than some experienced instructors can be given. The returns from endowment have shrunk at the same time, till it now takes two and a half times as much endowment to support a given enterprise as it did in 1929. Current budgets have therefore had to be met by current gifts. Alumni as a whole have responded nobly to the call for help, but alumni funds have not been sufficient in most cases to close the gap. Where else can the colleges look for support?

Colleges and universities will survive, somehow. That seems clear. Even in the 1930's very few closed their doors. Not only is their viability amply proved, but the demand for a college education is insistent and growing. Unless support comes from private sources it seems inevitable that it will come from public sources. That government should be the sole support of education, or even its major support, is a prospect to alarm those who believe in private enterprise. Industry, which for the most part means corporations, has thrived under the philosophy of private enterprise in America as nowhere else, and industry may with reason exert itself to prevent govern-

Corporation Support of Education

mental encroachment in a field as important as education.

There appear to be two major obstacles to corporation support of education—legal difficulties, and the problem of how to aid some institutions without incurring responsibility to many more.

Law Has Changed Since Early Days of Corporations

A marked change has occurred in the law since the early days of corporations. About seventy years ago an English chancellor said, "Charity has no business to sit at boards of directors."¹ Yet less than fifty years later a chancellor in the same court approved an appropriation by a chemical company of £100,000 for "the furtherance of scientific education and research" without further restrictions.²

The explanation of so marked a reversal may well lie in a change in the whole economy of the Western world. For these same years saw a tremendous growth in corporations. Control of wealth changed from many individual owners of small businesses to many large incorporated enterprises. And the English courts evidently recognized that the privilege, or perhaps the duty, of contributing to charity had accompanied this shift in the control of wealth and economic power from individual hands to corporate. The "climate" changed.

Such a shift in the control of wealth and economic power has been taking place equally in the United States. And a like shift of attitude about charitable giving has also been taking place. There is no doubt that, particularly of late years, such progress is marked and growing. This may be seen in several developments.

Many states have adopted laws that expressly permit such giving, most of them within the last few years. They are as follows:

Arkansas	(1951)
California	(1949)
Colorado	(1947)
Delaware*	(1943)
Illinois	(1949)
Indiana	(1949)
Maine	(1951)

Maryland	(1951)
Massachusetts*	(1948)
Michigan*	(1949)*
Minnesota	(1949)
Missouri*	(1946)
New Jersey	(1950)
New Mexico	(1951)
New York	(1950)
North Carolina	(1945)
Ohio*	(1945)
Oklahoma	(1949)
Pennsylvania	(1945)
Tennessee*	(1925)
Texas*	(1917)
Virginia*	(1945)
West Virginia	(1949)

* (The statutes of the states bearing an asterisk authorize charitable contributions but not specifically contributions to education.)

Technical legal obstacles to corporate giving are thus definitely removed in a substantial number of the larger states. Even in the other states, however, a case can be made that in view of the changing economic situation and the customs of the times, corporate giving can likewise be justified. The almost complete absence of reported cases in the last twenty-five years attacking charitable contributions is certainly significant. The Treasury has questioned whether some such gifts were deductible from taxable income as "expenses", but even these claims have generally been rejected by the courts. All this seems to bear out the prophetic observation made by a New York court in 1896:

As industrial conditions change business methods must change with them and acts become permissible which at an earlier period would not have been considered to be within corporate power.³

The common law follows custom. There can be little question about current custom as to contributions. For example, in 1947, 71 of the 100 largest manufacturing corporations gave over \$16,000,000 to charitable and welfare organizations.⁴ It is common knowledge that 40 to 45 per cent of the support of community chests comes from corporate gifts. That the federal income tax since 1936 has permitted corpora-

tions to deduct up to 5 per cent of their net income for charitable contributions is itself evidence that corporate giving is a common practice. Further, in the ten years following the passage of that provision corporate contributions increased from 30 million to 265 million a year.⁵

Removal of Legal Obstacles Does Not Justify Indiscriminate Giving

Removal of technical legal obstacles is of course not the whole answer to the problem. It is not a justification for indiscriminate giving. The issue of the benefit to the corporation remains. But it appears that in this respect, too, thinking has changed and that it is no longer essential that the benefit be so immediate and demonstrable as was formerly considered necessary.

For example, it is believed that no question has been raised about the legality of contributions to community chests. Yet fifty years ago the benefit to the corporate contributor might well have been considered dubious. For surely no corporation, either for itself or for its employees, benefits directly from all the agencies in the chest, or from any accurately predictable number of them. Giving is realistically justified on the possible rather than on the demonstrable benefits, and by the imponderable factor of public relations.

Likewise most corporations give to the Red Cross as a matter of course, and no one does, or should, object. Yet there the benefit is even less measurable. It is at best insurance on long odds against a calamity affecting the corporation or its employees. It has its public relations aspect. But the benefit obtained can hardly be said to be either very direct or very immediate.

In the last few years substantial contributions have been made by corporations to the United Negro

1. *Hutton v. West Cork Ry. Co.*, 23 Ch.D. 654, 673 (1883).

2. *Evans v. Brunner, Mond & Co. Ltd.*, L.R. (1921) 1 Ch.D. 359.

3. *Steinway v. Steinway & Sons*, 40 N. Y. Supp. 718 (1896).

4. National Industrial Conference Board, *Studies in Business Policy* No. 34.

5. *Year Book of Philanthropy*, 1947-8, John Price Jones.

College Fund. It may be said that these have been predominately by corporations that employ a considerable number of Negro laborers. Though the claim that education at the collegiate level of *some* Negroes tends in the long run to raise the living standards of other Negroes is valid, yet the benefit to a corporation's current employees by this means is certainly taking the long view and not looking for immediate returns.

Individual companies have answered for themselves the question of immediacy of benefit in interesting ways. For over twenty-five years the General Electric Company has maintained educational funds. One fund provides scholarships for employees or their children; the immediate benefit of such contributions is now commonly recognized. Less immediate benefit, however, can be traced in the case of other of its funds providing fellowships for graduate study. Applications for these fellowships are invited from outstanding students throughout the country. Fellowships have also been given to high school teachers of physics for summer "refresher" courses in science.⁶ These practices clearly promote education in lines of interest to the company, but even though a large percentage of the fellows may become employees the benefit to the company seems necessarily indirect; it is even more indirect in the case of high school teachers returning to their classes.

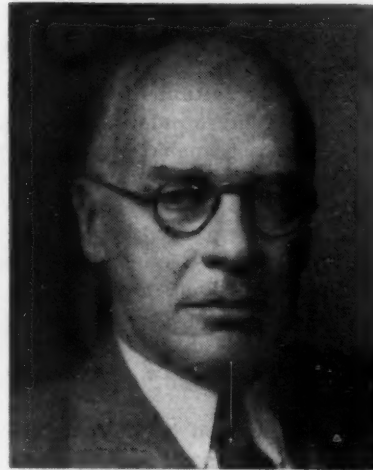
Many corporations have awarded undergraduate scholarships for their employees, so many as to preclude listing. More significantly, there is a growing tendency to furnish scholarships not confined to employees or their children. For example, the Kroger Company has been giving seventy-seven college scholarships in co-operation with the land grant colleges of fifteen Midwestern and Southern states in which the company operates retail food stores; any graduate of an accredited high school has been eligible. Similarly, the Radio Corporation of America has been making sixty scholarships avail-

able to second-year students enrolled in the field of pure science and engineering in approved universities.⁷

Sears, Roebuck Has Taken Lead in Making Scholarships Available

A leader in this type of contribution has been Sears, Roebuck and Company. Beginning fifteen years ago it has, either directly or through the Sears, Roebuck Foundation, awarded scholarships in agricultural colleges restricted only by the requirement that the scholar shall have come from a farm and shall state that he expects to return to agriculture. The awards go to students selected by forty-eight state agricultural colleges and fifteen state Negro colleges. Over the years awards have been made to more than 8,000 boys. The awards are not confined to Sears employees or to their customers. The benefits to Sears are thus entirely indirect. They depend on lifting the educational and living standards of the communities where Sears does business. There can be little question that Sears has benefited, but there can be equally little question that the benefit has been neither direct nor immediate. Sears similarly contributes to the work of the 4-H Clubs in many direct and indirect ways. It contributes to boy's clubs and to junior achievement in the cities.⁸ Sears thus recognizes that it is good business to raise the standards and earn the gratitude of the citizens of tomorrow. If it has been troubled by considerations of immediacy, it has resolved them in favor of contributing.

Admirable as the giving of scholarships is, it is to be remembered in considering the financing of higher education that tuition pays only a part, nearer a half than the whole, of the cost of instruction. Like any business, the direct cost is meaningless without considering the burden of overhead. If a scholarship does not pay the whole cost of a student, it means that the scholar (and the corporation which sends him) is benefiting by the generosity of some other donor, past or present. If awards of scholarships are legitimate it would seem legitimate to contrib-



Fabian Bachrach

Laird Bell is the senior partner in one of Chicago's largest law firms. He has been active in the work of the organized Bar for many years and is Chairman of the Board of Trustees of the University of Chicago and of Carleton College.

ute the full cost to the institutions.

This point has been met by the imaginative device of the Ford Motor Company Fund scholarship plan. The fund is awarding about seventy scholarships a year for the sons and daughters of Ford employees. The student selected may choose to attend any approved college or university he may elect and when he elects a private institution the Fund makes a supplementary contribution of \$500 annually toward the institution's general educational budget. The scholarships are for four years and include both tuition and a living allowance.

Corporations Are Making Grants for More General Purposes

A large number of corporation grants for more general purposes are now being made. Massachusetts Institute of Technology within the last two years has raised a large endowment fund, over a third of it from corporations. Many concerns contribute to both the endowment and the current expenses of the Business School at

6. General Electric Company pamphlet.

7. National Industrial Conference Board, *Studies*, supra.

8. Speech of E. J. Condon, Vice President, May 6, 1950.

Harvard. Something over \$750,000 a year is currently being contributed by corporations to the support of the Nuclear Institutes at the University of Chicago and in a campaign for continuing support of the Medical and Biological Research Center at the University, over \$100,000 a year has been pledged by local corporations and their foundations. The Industrial Relations Center at the University is supported entirely by corporations. This list is merely a sample and could be extended to great lengths.

This discussion is not concerned with the financing of special projects for corporations. In such cases the corporation really is buying something regarded by its officers to be of value to the corporation. The object here is to indicate that other less measurable benefits may be bought with equal propriety.

The question is not alone one of public relations, although it may be doubted that any corporation is hurt by a reputation for being public spirited. It is rather that in the long-range interest of the business community education is to be encouraged. On the basis of markets alone it is clear that an educated public is better than an illiterate one. More immediate considerations may also be present in the case of the privately supported institutions. Business fears encroachment of government on the private enterprise system. It may well be equally concerned lest education become dependent on government. Forty-seven per cent of students today are in privately supported institutions. Whether or not the fears of business are wholly justified, it seems clearly in the interest of business to keep this element of higher education free and vigorous. This is not discriminating against state-supported schools; they agree that strong privately supported institutions are both a protection and a stimulus to themselves.

Support for education should include general education as well as the production of scientists and specifically vocational training. For the larger a business and the more rapid-

ly it develops the more need there will be for well-rounded talent, in all levels of management, capable of keeping the fast moving machine in motion. College and university degrees are no guarantee of competence in the holder, but most men will agree that they give promise of a better gamble. Witness the experience of the Armed Forces when it became a matter of creating a body of officers in short order.

In the English case mentioned above, approving a gift for the furtherance of scientific education and research, the court spoke approvingly of the need for a "reservoir" of scientifically trained men for the purpose of its business. The same argument is at least equally valid in the United States. And indeed the principle need not be confined to scientists. Few businesses boast of an excess of talent in managerial positions. It must be true that it is worth while to develop a reservoir of potential executives as well as specialists. Substantial sums are laid out by many companies in recruiting. It can hardly be doubted that a reputation for support of education will aid successful recruiting. To such a reputation systems like those of General Electric and Sears undoubtedly contribute.

It is important that decisions as to support should be made on the merits. The old grad's claim for support of his own alma mater should be examined with skepticism. Executives must also be on their guard about the pet charity of a director's wife. In short, to defend a contribution, a corporation should establish a well-thought-out policy as to objects which will genuinely benefit the corporation.

Individual Charitable Trust Is Mechanism for Purpose

The individual charitable trust of a corporation is a rapidly growing mechanism for these purposes. A corporation turns over irrevocably money or property to such a trust (or a not-for-profit corporation) which is authorized to make contributions permitted under the In-

ternal Revenue Code. The trustees, usually chosen from the officers or directors of the corporation, are empowered in their discretion to make the grants. This tends to put more system and deliberate thought into the grants than a hurried executive could give. Further, it permits commitments for several years and provides a fund that can continue support in that future year when the business of the corporation itself may be bad.

It is believed, in view of the foregoing, that concern about legal obstacles to corporate contributions to education has been much exaggerated and that counsel may well re-examine, in the light of the developments of late years, any assumptions they have made that contributions are illegal.

Corporation Has Problem Deciding Which School Should Benefit

Undoubtedly a real problem confronts a corporation which believes it good business to aid education when it comes to distinguishing between different institutions. The solution of the problem is largely in the making at the present time.

The Ford Motor Company Fund furnishes one excellent solution of this problem. Under its terms the student chooses the institution. Of last year's seventy scholars, thirty-five chose seven different public schools, and thirty-five chose twenty-nine different private schools. With such a scholarship plan the company escapes all embarrassment of discriminating between schools. It is a pattern to be highly recommended.

Embarrassment may also be avoided by some type of classification that narrows the field of institutions which may bother the executives of the contributing corporation. Such classification can take many different forms. The most obvious is a regional restriction. This is most appropriate to the concern which does business in one or a few places. It is believed that a considerable amount of aid is currently being given by corporations on a "home-town" basis.

(Continued on page 173)

The Modern Philosophy of Pleading:

A Dialogue Outside the Shades

by O. L. McCaskill • Professor of Law at Hastings College of Law

■ In this article, an imaginary leader of the Bar attempts to teach his law-student son the virtues of some modern forms of code pleading. The son, who perhaps does not have any more respect for the theories of his elders than most law students, proves to be a difficult pupil. Although the father has the last word, some may think that the son has the better of the argument—one might suspect that Professor McCaskill, who is certainly no tyro at legal argumentation, may have provided the son with some of his points.

■ Mr. Laypleader, a lawyer of considerable practice, active in bar association movements for the simplification of judicial procedure, prides himself upon his progressive thinking and regards himself as something of a philosopher. He is hopeful that his son, a student in law school, will follow in his footsteps. Both are reading in the father's law library.

SON: This pleading is certainly tough! Dad, in my pleading course we are trying to find out what a fact is for pleading purposes. We are told it is not a legal conclusion and not something commonly expressed in a witness' language. It seems to be some sort of a conclusion having a relation to legal elements of a liability, neither too general nor too specific, which a layman of moderate intelligence may draw if briefly instructed in law, as jurors are instructed. It is said to have something to do with presenting and forming issues. It has a note of definiteness, but is elusive, for what is held to be a fact in one case is held to be a legal conclusion in another. It is

all bound up in a knowledge of legal techniques.

FATHER: I see, son, that your pleading instructor is somewhat behind the times. In the days of common law pleading the Bar had to struggle with the problem which is bothering you, but under the modern philosophy concerning pleadings they have the function only of giving fair notice. They make no attempt to form issues. Common law pleading was not concerned with fair notice, but only with forming issues, and rested upon the untenable ground that the parties knew nothing about a case except what was stated in the pleadings. This we know is nonsense, because the parties were participants in the events out of which the litigation arose. To get away from this foolishness, we discarded common law pleading and adopted a procedure so simple a 16-year-old boy may draft pleadings. Read Moore's *Federal Practice*¹ and Clark on *Code Pleading*.² They are the leading modern texts.

SON: Is this a Hadacol³ for plead-

ing aches and fevers, cancers and corns? If pleadings now are so simple, why such long texts by these authors?

FATHER: To explain simplicity, that is, to show the kind of simplicity; that it is the simplicity of the common man and not the simplicity which comes from knowledge and technical expertness.

SON: I do not quite understand that pleading to form issues is not concerned with fair notice. Does it not give notice of the issues between the parties, both to them and to the court, and is not that the all-important kind of notice?

FATHER: As I have pointed out, because of participation in the events giving rise to the litigation the parties, without any pleadings, know the issues, hence, notice as to them is useless and pure formalism. The court will learn the real issues later on when the evidence is heard.

SON: Are you not assuming honesty of all litigants in making claims, or that they saw, heard and interpreted alike; that interest does not

1. 1 Moore's *Federal Practice* (1st ed.) 440; (2d ed.) 1648. Cited with approval in *SEC v. TimeTrust, Inc.*, 28 F. Supp. 34, at 41-2 (U. S. Dist. Ct. N. D. Cal.), also in *Smith v. Mills*, 225 P. (2d) 483, 486 (Colorado Sup. Ct. Colorado has adopted the new Federal Rules). Cf. *Arnold, et al.*, 36 W. Va. L. Q. 32 (1929) upon parties knowing issues without pleadings. For a different view, see Fee, "Justice in Search of a Handmaiden", 2 U. of Fla. L. Rev. 175, 177-180 (1949).

2. Second ed. 82, footnote 25; 137, 143, 146.

3. Cf. "The Hullahaloo About Hadacol", *Reader's Digest*, July, 1951, page 11.

distort vision; that there will be no exaggeration, conscious or unconscious? If these things are not realities, why so many actions? Why juries or judges to decide fact controversies?

FATHER: Son, I fear you have been talking to, or reading some of the drivel of, the intransigent bifurcaters. Clark silenced them in his book on code pleading.⁴

SON: What is an intransigent bifurcater?

FATHER: I got the term from Clark and had to look it up myself. Intransigent means stubborn and immovable, symbolized by the beast with long ears and a vibrant voice—

SON (interrupting): Also sure footed, and with dynamite in its heels?

FATHER: Do not be facetious. While bifurcation rhymes with prevarication, it means to divide, in pleading to divide into counts. It was a common law pleading scheme to form distinct and separate issues. It involved form and techniques which no mere layman could draft or understand if drafted by a lawyer. For over one hundred years there has been a trend in pleading reforms away from professional techniques toward pleadings which the ordinary man can understand and, if he so desires, draft himself.⁵

SON: Does this trend away from techniques in draftsmanship obtain in other professions, such as engineering, architecture, or medicine?

FATHER: No, but they are different. Their plans and specifications, or prescriptions and directions, are written for the understanding of those who are expected to do a technical job. Now, the great majority of lawyers, as experience shows, have not been able to acquire pleading techniques helpful to the courts,⁶ and, after all, why should they? The judges and opposing lawyers can understand ordinary language better than jargon, and why not let the client and man on the street know what is going on? The draftsmen of the 1848 New York code of procedure saw the light when they provided in that code that the com-

plaint should contain a statement of the facts constituting the cause of action in ordinary and concise language "in such a manner as to enable a person of common understanding to know what is intended".⁷ Talk that over with your professor, son. He ought to get wise to modern trends. See you later.

[After several days]

FATHER: How is the pleading coming along, son?

SON: We looked up your reference to the 1848 New York code of procedure, and found that although you have correctly quoted it, the 1849 New York legislature, either at the suggestion of the original draftsmen or of its own initiative, deleted the clause "in such a manner as to enable a person of common understanding to know what is intended". Could the reason for this have been a realization that a person of common understanding, without any technical knowledge, could not know what is intended by "facts constituting a cause of action", and deleted a requirement of the impossible? You will remember I had some difficulty with that, though it is becoming clearer. We found also that in 1849 the New York legislature amended the section on joinder of causes of action by adding a provision, not in the original draft, that the causes of action joined should be separately stated. Does not that indicate belief that a cause of action, though a technical concept with definite boundaries, could be stated in concise and ordinary language with those boundaries indicated, so that the workmen, the lawyers and judges could better understand them?⁸

FATHER: I was not aware of the amendments, but, even so, the de-

duction does not follow that a legal concept was being adhered to. The provision for ordinary and concise language was retained, indicating retention of a layman's concept of a cause of action, a transaction or event as a lay witness might see it. Wholly different transactions, in this sense, might well be required to be separately stated. A layman would do it himself. Clark has explained that in his book on *Code Pleading*. The bifurcaters, of course, would see it differently, because they are intent on making the pleadings show the issues important in law, and that, under the new philosophy, is not what they are for. They should give notice of events only. Clark defines the code cause of action as an aggregate of operative facts which will give rise to some relief, but not limited to any particular relief, and, becoming more definite, he says: "This means that a lay or non-legal grouping of the facts into a single unit, as non-professional witnesses would do, will be the most practical".⁹ You see, that makes a pleading a layman can understand and draft.

SON: We have been over that in our course, but our professor thinks that Clark confuses the cause of action with the transaction. The section on joinder of causes of action provides that the causes of action joined must arise out of a transaction, or a number of them. They must be different concepts for one to arise out of the other. The transaction seems to be the lay concept rather than the cause of action. It is true that on a general demurrer to a complaint for stating no cause of action, the prayer for relief is properly disregarded.¹⁰ The inquiry is not what cause of action is stated,

4. Second ed. 41, footnote 111; 82, footnote 25.
5. Clark, "The New Federal Rules of Civil Procedure: the Last Phase—Underlying Philosophy, etc.", 23 A.B.A.J. 976 (1937); SEC v. *Timetrust, Inc.*, 28 F. Supp. 34, at 41-2 (1939), referring to Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, (1938) 219-220.
6. Clark on *Code Pleading* (2d ed.) §5.
7. First Report of N. Y. Commissioners, Code of Procedure, §120.
8. New York Code of Practice, 1851, Voorhies, 145, citing *Durkee v. Saratoga and Washington*

R.R., 2 Code Rep. 145 (1849); See also McCaskill "Actions and Causes of Action", 34 Yale L.J. 614, 623, footnote.

9. Clark on *Code Pleading* (2d ed.) 137, 143, 147.

10. *White v. Lyons*, 42 Calif. 279 (1871); *Donovan v. McDewitt*, 36 Mont. 61; 92 Pac. 49 (1907); McCaskill, "The Elusive Cause of Action", 4 U. of Chicago L. Rev. 281; *American Fire & Casualty Co. v. Finn*, 71 S. Ct. 534, 539 (1951); 340 U. S. 849; and cases there cited. For utility of separate statements, see *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U. S. 384; 70 S. Ct. 200, 205 (1949).

nor how many, but whether any of any kind is stated. However, if the demurrer is for failure to separately state, or if the defendant is in default, a closer scrutiny is required, and the boundaries of a specific cause of action must be ascertained. In these situations legal theory seems to be important. We are warned to beware of generalizations based upon one situation. Our professor thinks Clark and Moore are overstressing conciseness and ordinary language; that in their zeal to escape from all form, they see in conciseness and ordinary language a complete elimination of anything a layman cannot understand. He says they are making the tail wag the dog; that they have imbibed too freely of a good, but potent, spirit, and can no longer distinguish between freedom from the bonds of absolute formalism and license to dispense with all discipline. He says their interpretation of the New Federal Rules, and of the codes, lowers the standards of pleading to fit the incompetent or lazy lawyer, instead of keeping the standards where pleadings will be of some use to the courts, and making those who wish to practice in the courts meet those standards. He has some difficulty in reconciling their pleading philosophy with raising the standards of legal education. He hints they are New Dealers, who have carried their political philosophy into their philosophy about pleadings; that they get their common man and efficiency mixed up. Of course, the prof is a Republican.

FATHER: There you are! I'll bet he is for Taft also! Of course, we are for the common man. That is why we are for pleadings he can understand. If technical concepts get in our way, we wipe them out, and construe rules to that end. What is language for but to carry out an idea?

SON: Who's idea?

FATHER: I must go now. Look out for that pleading professor. He is an intransigent bifurcater and a pleading pundit. Clark discredited those ideas.¹¹

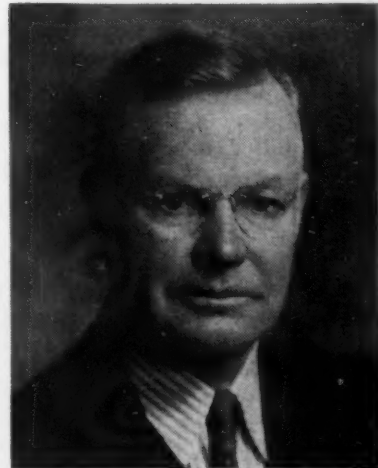
[Some weeks later. Mr. Laypleader enters his library whistling.]

SON: Won a case, Dad?

FATHER: Not exactly, but I taught some federal pleading to one of the old timers who moved to dismiss my complaint for failure to state a cause of action. I wish your pleading professor had been there.

SON: You convinced the judge it stated a cause of action?

FATHER: I did not even try to do that. It wasn't necessary. I read him the modern philosophy concerning pleadings from Moore's text. Told him Moore was research assistant to the Supreme Court's Advisory Committee which drafted the New Rules. I read him Judge Clark's opinion in the *Dioguardi* case¹² where he states expressly that under Rule 8(a) and Rule 12(c) of the New Rules it is no longer necessary to allege facts constituting a cause of action, but only "a short and plain statement of the claim showing that the pleader is entitled to relief"; that while Rule 8(a) may seem to place an affirmative burden on the pleader, Rule 12(c) clearly places the burden on the mover to show that the pleader is not entitled to relief. Unless the pleader has been foolish enough to put some allegations in the complaint which show that under no circumstances can he have relief in law, as where he shows a contract upon which he sues is contrary to public policy, the mover, without going into the evidence by presenting affidavits, cannot show the pleader is not entitled to relief. Mere omissions to state anything in a complaint do not show that a plaintiff is not entitled to relief. It is a neat trick of construction which works a reverse English on anyone who is foolish enough to move to dismiss a complaint on the pleadings alone. It is a part of the modern philosophy of deleting words from any Rule which stands in the way of the construction you want. I told him Judge Clark was the Reporter of the Supreme Court's Advisory Committee, a member of it, who helped draft the Rules; that if anyone knows what these Rules mean they are the draftsmen of them. That was all I had to do. My opponent argued that Clark



O. L. McCaskill has been a professor of law, teaching pleading and practice, for over thirty-five years at West Virginia, Cornell, Illinois, and the Hastings College of Law. He is the author of numerous legal articles and was one of the leaders of reform in 1934 of Illinois practice and pleading.

and Moore are only two participating in the draft of a large Committee; that although the Supreme Court adopted the Committee's draft, assuming all its members agreed on the meaning of the language, it did not follow that the Court adopted the meaning of the Committee. The judge just smiled at him, and said he would never grant a motion to dismiss an action on the pleadings alone; that he would either overrule the motion or postpone decision on it until it was brought up in connection with a motion for summary judgment or on a pretrial hearing, just as Judge Clark said was the proper practice in the *Dioguardi* case. You see, if a judge follows that course there can be no appeal from his decision, for appeals generally lie only from final judgments. If he should grant a motion to dismiss, without leave to amend, he would have to enter a

11. Footnote 4, *supra*; McCaskill, "One Form of Civil Action, But What Procedure for the Federal Courts?", 30 Ill. L. Rev. 415-416, citing article by Clark and Moore in 44 Yale L. J. 1291.

12. *Dioguardi v. Durning*, 139 F.(2d) 774 (1944).

final judgment and then he might be upset on appeal. Overruling or postponing decision on motions reduces almost to zero appeals on questions of pleading. If the judgment after a full trial on the merits is thought to be correct by a reviewing court it will not, of course, reverse however erroneous it may believe a ruling on the pleadings may have been. Some time may have been wasted, but a reviewing court will not cause a waste of more time. It is a great scheme to cover up minor mistakes en route, and saves a lot of time. It is not difficult to get the inferior courts to follow the postponement course. There is a natural tendency to postpone important decisions. Something may come up to make it unnecessary to make them. Judges do not like to be reversed and will naturally avoid risks of reversal. Although postponements may ultimately waste the time of the court and of the parties, there is a feeling everybody will be better satisfied if there is a full opportunity to present the evidence before a final decision is made. Add up these factors and see what chance there is to prevent a postponement.

SON: Tell me more about that *Dioguardi* case before Judge Clark. It sounds interesting.

FATHER: The defendant in that case was Collector of Customs. Plaintiff was consignee of a shipment of some tonic which had a lot of spirits in it, the shipment being from Italy. The consignment had been tied up in Customs for failure of the consignee to pay some charges he claimed should have been paid by consignor. The Collector of Customs, after holding the goods a year, sold them at auction. Plaintiff was a bidder at the auction, he claimed the highest bidder, but the spirits were sold to a distilling company. The plaintiff, who could not use our language very well, sued the Collector, individually and officially, and drafted his own complaint. The defendant's motion to dismiss for failure to state a sufficient claim in law was granted by the District Court, with leave to amend. He filed an

amended complaint, more voluble than the first, but still disclosed no grounds for relief. The District Court offered to appoint a lawyer to draft another amended complaint, but Dioguardi refused to get a lawyer or accept one appointed by the court, and the court dismissed the amended complaint and entered final judgment for defendant. Dioguardi appealed to the Court of Appeals, and it reversed the District Court, remanding the case, Judge Clark rendering the opinion. He said that here was an example of haste making waste; that defendant below had made no effort by motion for summary judgment supported by affidavits, nor by motion for a pretrial hearing, to show plaintiff had no real merit in his claim, and that a mere formal motion to dismiss under Rule 12(c) did not show it.

SON: What happened on the remandment?

FATHER: If you insist, there was a trial on the amended home drawn complaint. Dioguardi failed to prove a right to relief, and judgment went for defendant. Dioguardi again appealed to the Court of Appeals, where that judgment was affirmed.¹³

SON: Who, then, wasted time, the District Court or Judge Clark?

FATHER: You are forgetting the satisfaction given Dioguardi and the public by the full hearing on the evidence. Such a procedure gives the public greater confidence in the courts than decisions on pleadings alone. The courts should take time to do that and it is not wasted time. You see, the District Court there got reversed by not following the postponement procedure. Do you think it will sustain any more motions on pleadings?

SON: There was merit in your case, was there not? You investigated it before bringing the action. I assume?

FATHER: As a matter of fact, I did not, and have not yet done so. I suppose it has merit. The client was in a hurry and wanted suit brought right away. I was busy. He said something about being defrauded out of a large sum of money and that was

enough for me to draft a complaint claiming damages for fraud without indicating any detail. Whether he was in fact defrauded will come out on the trial. He is entitled to be heard on that. Under the modern philosophy, we do our investigating just before trial, or before motions for summary judgment or pretrial hearing, if they are made. I have had my secretary draw the complaints when I was busy, knowing I had plenty of time to investigate later. The *Dioguardi* case has been a great boon to us.

SON: I thought there was some obligation on attorneys to discourage unfounded litigation and how can they if they postpone their investigations until after complaints are filed? Does not this postponement practice encourage speculative litigation, the bringing of actions for nuisance values and hope of settlement? Does it not encourage people like Dioguardi to dispense with lawyers and take the time of courts without any preliminary screening of their claims? Under the new philosophy, are the courts advertising for business, inviting people with supposed grievances to bring them in for a hearing? Are there not laws against champerty and maintenance?

FATHER: The poor and the uneducated are entitled to justice. We have greatly softened our old notions about champerty and maintenance which often kept lawyers, or even more enlightened friends, from informing the ignorant of their rights unless they sought the information, and how could they seek it, being ignorant? We are gradually removing the old restraints on litigation. We are making it cheap to get into it, and to get to a hearing. Only the rich and the public pay later costs, as the poor have nothing to pay with. If there is a fair prospect of winning, or of getting a settlement, lawyers may accept contingent fees. This, of course, encourages some of them to loan clients preliminary costs, also on a contingency. Don't you see the modern trend to make everything

(Continued on page 174)

13. *Dioguardi v. Durning*, 151 F.(2d) 501 (1945).

The Administration of the Federal Courts:

A Review of Progress During 1950-1951

by Leland L. Tolman • Administrative Office of United States Courts

■ The Annual Report of Henry P. Chandler as Director of the Administrative Office of the United States Courts, covering the year which ended June 30, 1951, was released by the Judicial Conference of the United States at its regular annual meeting last September. Believing that the Bar has an interest in this accounting of the business of the federal courts, the *Journal* here publishes its usual summary of the report.

■ The urgent need for additional federal judges recommended for particular districts where dockets are becoming more congested is emphasized by the *Annual Report for 1951* of the Director of the Administrative Office. The report refers to the legislation (S. 1203, 82d Congress), which recently passed the Senate and is now pending in the Judiciary Committee of the House of Representatives, and which authorizes additional judges for Indiana, the Eastern District of Texas, Colorado, the Eastern District of Pennsylvania, the Southern District of New York, the Southern District of Florida, the Northern District of Ohio and the Eastern District of Wisconsin. The caseloads in these districts are particularly heavy and the increase in judge power for them is recommended by the Judicial Conference. The bill also provides for a number of other circuit and district judge-ships as well. Speaking of this legislation Mr. Chandler says:

There is acute need in some courts for added judges. This results from the general rise in the load of civil cases. . . and from special congestion in particular courts. . .

There are two great objectives in the deciding of cases by courts. The first is that they should be decided justly. But a second which is also important is that they be decided with reasonable promptness. Courts today are more frequently criticized on account of failure to meet the second test than the first.

Promptness in the determination of cases in the federal courts calls for industry and efficiency on the part of the judges and for readiness of the people through the Congress to provide the number of judges reasonably needed to handle with dispatch the expanding judicial business. As is known, the Judicial Conference of the United States and the judicial councils of the circuits are steadily endeavoring to bring about the most effective judicial procedures. . . . But there is a point beyond which no amount of diligence on the part of judges of a court, or of skill in avoiding lost motion and wasted effort and getting to the heart of controversies, will avail. That is the point where the number of cases is too large for the judge or judges to handle with reasonable effort.

When this condition exists, a number of evils follow of which unfortunately there are plain examples in some federal courts at the present time. First the number of pending cases increases, the time necessary for

decision lengthens, and litigants are bound to suffer from the delay. Sometimes the consequences in impoverishment, coercion to an unjust settlement, loss of morale and weakening confidence in the judicial system, are tragic.

Second, when the number of judges in a court is inadequate the judges who are functioning are under constant pressure. This naturally leads to nervousness, impatience, and an inclination to shut off evidence and argument in order to get to the next case. The judicial process works best in an atmosphere of calm. There must be opportunity for deliberation and reflection. This cannot be if the judge is bowed under an insupportable burden of cases.

Third, if a judge is required to work long under conditions of strain, his health is likely to break and the country loses for the time or permanently, the investment which it has made in his judicial experience. Again and again this is happening to some federal judges in their effort to keep abreast of their calendars. They are driving themselves night and day, going almost without holidays or vacations. Despite it all, they see the backlog of their cases going up. They are haunted by the consciousness of cases on their calendars which in fairness to the parties ought to be heard, but which they are unable to reach. Like Sisyphus, no matter how hard they try to push the stone up the hill, it is continually rolling down upon them. To put judges in this position is not fair to them. Aside from that it cannot be good for the court nor the country. Wherever such a condition exists, relief in the shape of added judge power cannot come

too quickly. More than that, through forethought reinforcement should be provided well before matters reach that stage.

The Judicial Conference of the United States in making recommendations for additional judgeships, has the benefit of complete statistics concerning the judicial business and of the advice of its members who are intimately familiar with the work of the courts in their respective circuits. It recommends only when in its opinion there is a clear need. To make and keep the ideal of prompt justice a reality in the federal courts, its recommendations merit favorable action by the Congress and I trust that it may come soon.

Civil Caseload Increases Over 5 Per Cent

The statistics which accompany the report, and which are analyzed in it show that both in the courts of appeals and in the district courts, the volume of litigation which requires the greater part of the time of the judges is increasing. In the courts of appeals the number of cases increased 5.4 per cent from 2,830 in 1950 to 2,982 in 1951—about one-fifth of these were from administrative agencies, such as the Tax Court and the N.L.R.B., and the remainder were appeals from decisions of the district courts. The Fifth, Ninth, District of Columbia, and Second Circuits received the greatest number of cases. The number of cases terminated was 153 less than the total number filed so that the year closed with 1828 cases pending. Cases were disposed of somewhat more rapidly this year than last; half of them were decided in 1.5 months or less from the time of hearing, and the median time interval from the filing of the complete record to the final disposition in all cases terminated was 6.7 months (as compared with 7.1 months in 1950).

In the district courts, the condition of the civil dockets was again less favorable this year than last, although the number of civil cases filed (51,600) was about 6 per cent less than in 1950 (54,622). The decrease was due almost entirely to a decline in the number of cases brought by the United States. The

number of new, private cases remained nearly the same as in 1950 (about 32,200). Since private cases by and large take far more of the time of the judges, their large number has continued to cause greater congestion of the dockets. As a result, the number of private cases pending when the year ended went up to 35,582 from 34,825 a year ago to reach a new high for more than a decade. The number of civil cases terminated in 1951 (52,119) was somewhat less than in the preceding year (53,259) and the number pending when the year ended was 55,084, which at the current rate of disposition would be more than a year's work even if no new cases were begun.

Most Serious Congestion Is in New York

As in previous years, the most serious situation is in the Southern District of New York where there are sixteen resident judges. On June 30, 1951, 11,148 civil cases were pending on its dockets, slightly more than in 1950. This is more than one-fifth of all the civil cases pending throughout the country, and more than were pending in all of the district courts of the First, Fourth, Seventh, and Eighth Circuits combined, with fifty-eight district judges. The estimated time from joinder of issue to trial in that district has risen to twenty-nine months in jury cases, twenty-three months in nonjury cases and thirty months in admiralty cases, compared with a national median of 7.8 months in jury cases and 6.9 months in nonjury cases. Other districts where congestion continues or is developing are the Eastern District of Pennsylvania, the Northern District of Ohio, and the Northern District of Illinois. However, the report indicates that in the District of Columbia and New Jersey, where there has been congestion for a number of years, small but gratifying decreases were made during the year in the number of pending cases, although the dockets are still in arrears.

Throughout the country, the time for disposition of civil cases shows an increasing trend. Since 1947, the

median time from commencement to disposition has increased steadily from 9 months to 12.2 months in 1951. The increase is one month since a year ago when the median was 11.2 months. Commenting on this, Mr. Chandler says:

... The time in a number of district courts, mainly in the metropolitan districts, was much higher, the maximum being in the Southern District of New York where it was 35.4 months. The continuing trend throughout the country toward a longer time for the disposition of civil cases presents the most serious problem of the federal courts at present and is a challenge to the utmost efforts of all who can contribute toward overcoming it.

Volume of Criminal Cases Increases in Year

The volume of criminal cases in the district courts also increased in 1951 to 38,670 from 36,383 the previous year, but since the increase is entirely due to violations of the immigration laws occurring in five districts on the Mexican border, it does not indicate a general nation-wide increase in the criminal business of the federal courts. Indeed, if the immigration cases are excluded from the total in all years, the number went down in 1951 to 23,705, which is the smallest number begun since the time of the first World War and is 20 per cent below the number in 1941. The number of criminal cases terminated in 1951 exceeded the number begun and so the pending case load was reduced to only 7,701, of which over a fifth involved fugitives who could not be tried.

There was a continued increase in 1951 in the number of bankruptcy cases begun, but the proportion was much smaller than it has been in the past four years. Thirty-five thousand one hundred ninety-three cases were begun, 5 per cent more than in 1950, as compared with a 28 per cent increase in 1949 and 41 per cent in 1948. The pending bankruptcy case load at the year's end had increased to 40,922 because the number terminated (32,647) although more than 7,000 greater than in 1950, was still below the number commenced. Com-

menting on the bankruptcy statistics, Mr. Chandler said: "Time is too short to determine whether the recent decline will continue. For the time being at least the number of new bankruptcy cases is levelling off or dropping a little."

While a greater number of cases were closed, this was accomplished without adding to the number of referees' positions. Also, the work was aided in a large measure by the furnishing of more clerical service where the work was pressing. The report states the hope that this economical method may be utilized to a greater degree in the current year and that more clerical aid where needed, combined with the slackening or perhaps cessation of the increase in new cases, will enable the referees to effect a substantial reduction in the number of pending bankruptcy matters.

The special salary and expense funds for referees maintained in the Federal Treasury remained in satisfactory condition. Receipts into each fund from fees paid by litigants were larger than in 1950 and the surplus accruing in each fund was larger than at any time since the establishment of the salary system.

An amendment to the bankruptcy law (11 U.S.C. Section 94 (d) and (e)) was passed by Congress in July, 1951, which, the report estimated, will save \$50,000 annually in publication costs in bankruptcy proceedings as well as the clerical work involved. The law makes publication of notice of the first meeting of creditors discretionary with the Court, instead of mandatory as it was under the law previously in force. The mailed notice is the one which gives actual notice to creditors, and this continues to be mandatory in all cases.

Temporary Assignment of Judges to Courts Outside Circuits Decreases

The provisions of law which permit the temporary assignment of judges to district courts outside of their circuits, to relieve congested dockets, were used less this year than last. In 1951, thirteen such assignments were made, eight of them to the Southern

District of New York. Commenting on the decrease in the number of assignments, Mr. Chandler says:

There seem to be two principal reasons for this: first, there has been a general increase over the country in latter years in the amount of judicial work measured by its demands upon the judges. This applies to most districts and makes it much more difficult than it was for judges to respond to calls for help in other circuits. Second, the increase in the cost of hotel accommodations, particularly in metropolitan districts where outside help is most urgently needed, puts a severe financial burden upon judges coming from the outside to sit in such districts, who under the present statute are allowed a maximum of \$10 a day for subsistence. This is more of an obstacle to outside assignments to district courts which should be for fairly extended periods, than it is to such assignments to courts of appeals which ordinarily are for only a few days.

Turning to matters of general administration, Mr. Chandler reports that the number of judicial and supporting personnel of the federal courts (excluding the Supreme Court), as of June 30, 1951, has increased slightly to 4331 from 4311 a year ago. The number of circuit judges rose from 63 to 65, and the number of district judges from 212 to 216. There were 49 retired judges as against 44 a year ago. The number of personnel in the offices of clerks of court fell in 1951 from 1117 at the beginning to 1097 at the close, while the members of the probation staffs rose from 493 to 510, and the bankruptcy personnel increased from 438 to 460. There were 658 United States Commissioners in 1951, 16 less than in 1950.

The report reviews the efforts made during the year to increase the efficiency of business methods in the court offices by the installation of modern financial receipt machines, looseleaf dockets, card indices, and the microfilming of current and old records.

In collaboration with the National Archives, a number of district courts, where the accumulation of old records has created acute storage problems, have transferred to that agency substantial quantities of those



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records, and so cleared valuable office space for more profitable use. In a number of multiple-judge courts the judges have co-operated to effect the improvement of central libraries for their collective use, where books which are needed only occasionally will be available without wasteful duplication, and with the advantage of permitting the purchase of a wider range of volumes without the expenditure of more money. The report expresses the gratitude of the Administrative Office for this co-operative spirit, which this year has been of special importance because of the insufficiency of the appropriations made by the Congress for the purchase of law books, office machines and other miscellaneous, impersonal facilities of the courts, due to the large rise in prices for all such facilities.

Probation Service Caseload Falls to 94.6

In his discussion of the probation system, Mr. Chandler observes that the average caseload of the probation officers fell from 99 the previous year to 94.6 at the end of 1951, as a result of the substantial decrease in the number of probationers and military parolees under their supervision. Mr. Chandler points out, however, that although the caseload is now lower than at any previous time in the federal system, it is still too high for

efficient supervision, and that the greatly increased burden on the probation officers because of the increasing use by the courts of presentence investigations made by the probation officers aggravates this condition. The report also refers to two laws of the present Congress (Public Law 62, of June 29, 1951, and Public Law 98 of July 31, 1951) which will affect the volume of supervision of prisoners in parole and conditional release. The first, which does away with supervision of prisoners on conditional release when they have 180 days or less to serve, will probably reduce the number of persons to be supervised by about 3,000. The second, which will reduce the term of sentence requisite for parole from one year to 180 days will on the contrary somewhat increase the number of parolees requiring supervision. The report also calls attention to the enactment on September 30, 1950, of Public Law 865 (81st Congress) known as the Federal Youth Corrections Act which is patterned upon the American Law Institute's Model

Youth Corrections Act, and provides in the discretion of the sentencing judge for a more individualized treatment of offenders under 22 years of age. Since the report was published provision has been made in the appropriations to the Department of Justice for the current year which will permit operations under this act to begin on a modest scale.

The number of United States Commissioners (the federal committing magistrates) declined in 1951 from 674 to 658, partly due to lapses of positions having only a very small amount of business. Since 1943 the Judicial Conference policy has been to appoint no more commissioners than are clearly necessary, so that those who serve may have enough business to become proficient in their duties. Seven of those now in office are full-time officers while the remainder are part-time. Members of the Bar occupy 369 of the positions.

The report presents tables showing the average and median earnings of the official court reporters in the district courts from their official work

and from private reporting which they perform when they are not needed by the courts they serve. These figures show that since the official reporting system was established the trend in net earnings from salaries and official transcript, from private reporting and from both official and private work has been somewhat but not greatly, upward. The amounts in 1951 were higher than in any previous years. The report indicates that the present scale of compensation for each reporter has been thoroughly studied by the Administrative Office, in the light of present conditions, and that recommendations on the subject have been made to the Judicial Conference.

Mr. Chandler's report is accompanied by a detailed analysis and tables concerning the courts' business, prepared by Will Shafroth, the Chief of the Division of Procedural Studies and Statistics in the Administrative Office. It was presented to the Judicial Conference at its September, 1951, session.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1952 Annual Meeting and ending at the adjournment of the 1955 Annual Meeting:

Arkansas	Nevada
Colorado	New Hampshire
Delaware	New York
Georgia	Ohio
Idaho	Oregon
Indiana	Rhode Island
Louisiana	Utah
Maryland	West Virginia
Minnesota	

An election will be held in the State of Georgia to fill the vacancy for the term expiring at the adjournment of the 1952 Annual Meeting.

An election will be held in the State of New Mexico to fill the vacancy for the term expiring at the adjournment of the 1953 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1952 must be filed with the Board of Elections not later than April 18, 1952. Peti-

tions received too late for publication in the April issue of the JOURNAL (deadline for receipt February 29) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 25, 1952.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., April 18, 1952.

Attention is called to Section 5, Article VI of the Constitution, which provides:

Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in

parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

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The American Journal of Comparative Law:

A New Magazine for Lawyers

■ During the recent sessions of the American Bar Association in New York, an important step was taken to co-ordinate and expand the activities of the law schools and of the Bar generally in the comparative study of foreign and international law. On September 17, 1951, in Vanderbilt Hall, the new, impressive home of the New York University Law School in Washington Square, some twenty representatives of the law schools that have pioneered in comparative legal studies in the United States, met to organize the American Association for the Comparative Study of Law, Inc. The primary purpose of this Association, incorporated under the laws of the State of New York, is to establish and maintain a new journal, *The American Journal of Comparative Law*, in order to promote the expanding interest in comparative law, private international law, and in the related developments in the domestic laws of foreign countries.

It should be apparent that the enormous extension of the foreign interests of the United States in the twentieth century, an inevitable concomitant of the important part which the country has had to assume in world politics since World War I, despite prior isolationist preconceptions, has imposed upon the Bar of the United States widely increased responsibilities. It is no longer possible for those who are concerned with the complex problems of private as well as public law that inevitably arise in connection with the

foreign commerce of the United States and the effort to establish an international legal community, to ignore or underestimate what is happening in other parts of the world. To conceive these questions adequately, to enable the lawyer or the law teacher who has to deal with the new and acute international problems of today, adequate sources of information are needed, so that the intelligence and devotion which the Bar of the United States has so conspicuously exhibited in the development of our domestic laws may not have to operate in considering these problems without sufficient understanding or perchance in a vacuum. This need it is the purpose of the new *American Journal of Comparative Law* to subserve.

For a long time, the need for such a development has been all too obvious. Since the short-lived annual *Bulletin of the Comparative Law Bureau*, edited by William W. Smithers, appeared from 1908 to 1914 and thereafter once in 1933, there has been in this country no appropriate publication enabling the American lawyer, as was observed in the first issue of the *Bulletin* (page 5) to "add to his forensic forces those supporting powers which can be derived only from the knowledge of the law as a science, its fundamental principles as manifested in comparative jurisprudence, its place in history, its influence upon civilization, and its vital importance to our own national life".

The new *Journal* is being organ-

ized so as to enlist the co-operation of the institutions and individuals that are especially qualified to contribute. The necessary funds to cover basic costs of publication are to be provided by the American Association for the Comparative Study of Law, Inc., to which reference has been made above; as a nonprofit corporation, it is qualified to receive gifts not only to support the *Journal* but also to provide for the special needs of comparative legal research. As declared in the certificate of incorporation, the purposes of the Association are "to promote the comparative study of law and the understanding of foreign legal systems; to establish, maintain, and publish a comparative law journal; and to provide for research and the publication of writings, books, papers and pamphlets, relating to comparative, foreign or private international law".

The principal class of members of the Association includes the leading law schools of the United States, in addition to the American Foreign Law Association, which, as above noted, has been extended so as to form a national association of the members of the Bar especially interested in international practice. As of the present time, ten schools have joined as sponsor members.

Although the primary responsibility for, and control of, the *Journal* is vested in the sponsoring law schools and the American Foreign Law Association as institutional

(Continued on page 134)

AMERICAN BAR ASSOCIATION

Journal

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Members of American Law Student Association, \$1.50 a year.

EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ The Lawyer Referral Service

On February 23, 1952, there will be held in Chicago a National Conference of Lawyer Referral Services.

Time was when it was a mere academic exercise to discuss the relative advantages of slavery in comparative security on the one hand and liberty with its famines and feasts on the other. Those days are gone. A large share of the earth's inhabitants have been persuaded to settle, as they think, for security in slavery. There are many among us who, with their eyes open, say that the woes of the underprivileged in the free-enterprise world are so deep that it is the duty of the privileged to change that world into one where the State will see that there are no degrees of privilege.

If we are not to be engulfed by slavery we must show that freedom is better not only for the man who is endowed with higher gifts of character, brain, body and fortune but for the mass of his fellows. *Pravda* and *Izvestia* publish news articles about the costly medical service in the United States and compare it with the free medical service in Russia. We are all satisfied that complete study of the subject would show that under our system a larger proportion get good doctoring than under theirs. That is not enough. The doctors and the lawyers and the others of us to whom accidents of heredity and heirship have given places of influence in this free world that is so good for us must justify it as good for everybody. Doctors must be able to show not only that a larger proportion get good doctoring than in Russia but that the whole population gets good doctoring. By the same token lawyers must be able to show

that the whole population gets good legal help.

Of course justice ought to be free. Human nature being what it is, however, free justice is an unattainable ideal. We have found nothing that serves the public interest so well as private support of the counsellor and defender of the citizen. Which of us, engaged in a controversy with an all-powerful State, would choose counsel supplied free by the State instead of counsel of our own choice paid out of our own pockets at no matter how great a sacrifice?

Then too, where the lawyer is paid by his client rather than the State, society not only avoids the weakness of reliance on a servant who has two masters but also gains the strength of reliance on a servant whose compensation depends either directly or indirectly upon his success. In short, society bends the profit motive to society's ends.

There comes a point, however, when this powerful and beneficent force of the profit motive is no longer available to society—where the patient or the client cannot afford to pay. At that point the doctors have shouldered their burden so well that it is a truism that the two groups who get the best medical help in this country are the very rich and the very poor. Perhaps we lawyers cannot claim the same credit, but no one can come into close touch with the administration of justice in the courts, both civil and criminal, without being impressed first, by the quality of the legal representation that is afforded by the legal aid societies and, second, by the serious dangers to liberty that would be involved if, instead of being furnished voluntarily by the Bar and the laity, legal aid were a function of the State and could be withheld or granted at the whim of those in power.

Strong as is the lawyer's duty to the poor, however, we have an equally important obligation where legal services can be furnished within the frame of our free enterprise system. If people who need those services and can pay for them do not get them, then indeed our system does not deserve to survive.

It is here that the Lawyer Referral Service assumes its great importance. The House of Delegates did well at its 1951 Annual Meeting to make as the second point of its long-range program

The promotion and establishment within the legal profession of organized facilities for the furnishing of legal services to all citizens at a cost within their means.

Lawyers have been content to get their bread and butter from the wealthy classes and to do their *pro bono publico* work among the poor. The great class of ordinary self-supporting, self-respecting people on whom the world must rely to stem the tide of Communism has been neglected. The Lawyer Referral Service points the way for members of that class to obtain competent legal services at prices that they can afford and for lawyers to broaden the scope of that part of the administration of justice where the lawyer's sole tie is to his client.

We must support our Committee on this subject. The progress which this new development makes in the next few years may well be the test of the survival of democracy. The Bar has no greater responsibility than to see that it succeeds.

■ Reforming the Bench

A Detroit newspaper recently, condemning the local judiciary in its administration of justice, declared: "Society is jeopardized by the dismal failure of a branch of the government which, above all others, should be beyond reproach." The editorial conceded that upon the local bench were some judges who possessed "high moral character and fine legal attainments", but deplored "the gross incompetency, venality and irresponsibility of their colleagues". It added, "The indictment against the Recorders and Circuit benches as a whole can be made a long one."

The charge made by that newspaper is a grave one. Whether or not the indictment is true, its publication inflicts irreparable damage upon the administration of justice. The Bench everywhere feels the ill effects when a number of *unidentified* judges serving in an important city are submitted for public condemnation and their court is limned as the "weak link" in the "public service".

Without intimating any impressions concerning the purported Detroit evils, it goes without saying that all misfits and men lacking in sound character should be denied judicial office. But, in making their charges, reformers should not undermine confidence in men who daily perform good service. The man upon the Bench, who deems his courtroom a hallowed place, rarely attracts public attention as he faithfully administers justice. His sound decisions and upright conduct are never "news". Scatter-gun attacks upon the "local judiciary" wound the pride of the good men and lessen their prestige as well as their effectiveness. Such attacks may drive from the Bench the latter's greatest ornaments, and render service in the judicial robe unattractive to men who would otherwise give a good account of themselves.

In seeking a remedy for the conditions which it says exist in Detroit, the editorial fears that since attorneys "have to appear before the judges", they may hesitate "to speak out in public", and, accordingly, suggests that the Bar "call upon a committee of experts—say the deans of several law schools—from outside of Michigan, to come here and make an unbiased survey."

It is deemed proper to seize upon the Detroit episode as an occasion for calling attention to means whereby the Bench can be improved permanently.

It is rare that our smaller jurisdictions find serious fault with their local judge. He was elected by people who knew him intimately, thought well of his character and, through extended observation of his daily con-

duct, became satisfied that he possessed aptitude for judicial work.

But the selection of the judiciary in our larger cities is often brought about in a very different manner. Comment is unnecessary.

The profession long ago deprecated the outmoded statutes of many of our states whereby, through political maneuverings, misfits and men lacking in good character ascended the Bench. Lawyers were convinced that the man in the street, who scarcely knows to which lawyer to go when he finds himself in trouble, cannot be expected to vote wisely when he is given a ballot containing the names of a score of would-be judges. The Detroit editorial says: "It is hard for the layman to assess the work of a judge. Only lawyers are generally capable of doing that." And yet, when lawyers "assess" the work of candidates for the Bench, and do so by the effective means of a secret ballot, their advice is often spurned by the voters.

Faced with the above factors, and for the purpose of securing a judiciary embracing none who gained their office through untoward means, or remained after their lack of fitness had been demonstrated, the profession brought forth a plan which has won general acclaim. It is known as the American Bar Association plan, having been adopted by the House of Delegates in 1937. (See 23 A.B.A.J. 108, February, 1937; 62 A.B.A. Rep. 893 (1937); 33 A.B.A.J. 1167, December, 1947; 34 A.B.A.J. 175, March, 1948; 72 A.B.A. Rep. 126 (1950). It is sometimes also known as the Missouri plan due to the fact that that state has adopted its principles. The plan eliminates self-starters. It has no use for political factors. Under that plan, no one can mount the bench unless he was recommended to the appointing power as a suitable appointee by an official nonpolitical nominating body. Once having gained the Bench, the incumbent must face the voters at regular intervals, but he does not run against self-seekers—he runs against his own record.

The plan has worked well everywhere where Jacksonian democracy, about a century ago, substituted an elective for an appointive judiciary. Many state bar associations have approved the American Bar Association plan and are working actively for its adoption. (See 1950 Annual Report, *supra*).

Every member of the Bar likes to find upon the Bench a man who commands his respect. Nothing delights him more. The best means of getting such men upon the bench is not through spasmodic "surveys", but by the adoption of legislation which minimizes the chances that the unworthy will ever wear the judicial robe. The legislation which has blazed the way is worthy of the serious attention of the other states.

Some newspapers and periodicals, notably the *New York Times*, the *Washington Post* and the *Woman's Home Companion*, have commented favorably on the American Bar Association plan. It is to be hoped that other publications which discern the weaknesses in the

current local methods of judicial selection and the merits of the American Bar Association plan will join the growing demand of those who want to secure the general adoption of this outstanding improvement in government. The bar associations will welcome their help with open arms.

Editor to Readers

■ In the November, 1950, issue of the *JOURNAL* appeared a guest editorial containing the following passage:

One outstanding example in which those tests were not applied is the case of Judge Harold Medina. On the recommendation of the political powers of New York, a party follower in Congress was nominated to fill a vacancy in New York. There were no judicial qualifications of the appointee. The New York State Bar Association, the Bar Association of the City of New York, the American Bar Association registered emphatic objections. The Judiciary Committee of the Senate was then controlled by the Republicans. When the quality of the appointment was revealed, it was apparent that confirmation was not possible and the appointment was withdrawn.

The gentleman referred to has pointed out to us that he could be positively identified from what was said. The fact is that he was never nominated for the position in question and therefore the statement that he was nominated to fill the vacancy is not correct. It is also a

fact that his judicial qualifications were not passed upon, therefore the statement that he had none was a misstatement. On June 6, 1947, the Chairman of the Committee on the Judiciary of The Association of the Bar of the City of New York wrote to him:

You are correct in your belief that the Attorney General did not request the Committee to report on you, that the Committee did not so report, and that, therefore, you were not among those referred to by the Committee in its report as being in its opinion unqualified for appointment.

The bar associations had no occasion to, and did not pass upon his qualifications; therefore, the statement that the American Bar Association and other associations registered emphatic, or any other, objections was not true. His nomination not having been made, it was not and could not have been withdrawn.

In the fall of 1947, he was nominated for Justice of the Supreme Court, New York City. That was the first and only time that his qualifications for judicial office were passed upon. The Association of the Bar of the City of New York then said he was "well qualified" for the office of Justice of the New York Supreme Court, and the New York County Lawyers Association said he was highly qualified.

In the light of these facts, it is evident that our editorial, reflecting as it did on the professional qualifications of the man in question, caused him distress and did him an injustice. It was not justified by the facts and we regret this very much. No injury or injustice was intended. We are glad to publish this apology to the Judge.

New Magazine for Lawyers

(Continued from page 131)

members, the articles of the Association provide for sustaining, subscribing and corresponding memberships. Through these memberships, individual members of the Bar who desire to support the purposes of the Association, in subscribing to the *Journal*, may also contribute materially to the development in the United States of this important area of legal study.

The *American Journal of Comparative Law* will appear quarterly and include in each issue leading articles by recognized specialists, which will be directed to the following objects: First, to survey trends in the laws of other countries that are of distinctive moment from a comparative or international point of view. Second, to

provide expert analysis of the principal institutions of public and private law, the understanding of which is essential whether from the viewpoint of comparative legal education or in dealing with problems involving foreign law. Third, to draw attention to the legal aspects of problems that arise in connection with the foreign commerce of the United States and are of special national interest. And, fourth, to direct attention to developments that deserve attention from the viewpoint of comparative law in the related areas of legal education, legal theory, sociology of law, legal history, and other disciplines.

In addition to full-dress articles, the *Journal* will include a section of concise notes and comments furnishing current information concerning outstanding phenomena in the legis-

lation, the judicial decisions and the legal "doctrine" of other countries. This, if desired by those specially concerned, will be supplemented by a digest of cases decided in the United States and elsewhere that involve the application of foreign laws or present conflicts of laws of an international, as distinguished from a federal, character. A third, and in certain respects a significant, part of the *Journal* will be devoted to a survey of foreign legal literature.

It is planned to issue the first number of the new *Journal* early in 1952. Meanwhile, the suggestions and inquiries (as well as the subscriptions—\$5.00 per year) may be addressed to the editor-in-chief, Professor Hessel E. Yntema, University of Michigan Law School, Ann Arbor, Michigan.

THE PRESIDENT'S PAGE



Trout-Ware
HOWARD L. BARKDULL

■ The Christmas holidays have afforded your President the only breathing spell of the entire Association year from a vigorous program of traveling, the schedule for the coming months being just about as strenuous as it has been since the New York meeting of last September. The chance to catch up on correspondence has been especially welcome. In the long run, the executive and administrative work is more important than speech-making.

The Committee on Scope and Correlation of Work had a productive session in Chicago, December 8 and 9. As time goes on, the fact becomes more and more apparent that this Committee occupies a key position in the framework of the Association, that it does not in any way interfere with the prerogatives of the Board of Governors but continues to look ahead into the future of the organization, charting a course to definite destinations. The recommendation has been made to the Committee that investigation be made of a plan of joint dues with state and local bar associations. Serious difficulties stand in the way, but there may still be some method whereby the organized Bar may avail itself of a vehicle already proved to be so beneficial to the national organizations in the other professions.

The Regional Meetings Committee, under the energetic leadership of Burt Thompson, of Forest City, Iowa, working jointly with Edward B. Love, Director of Activities, is completing plans for two Regional Meetings during the course of the present year. The first will be at

Louisville for the Ohio Valley states on April 10, 11 and 12, and the second at Yellowstone Park, June 17, 18 and 19, for the states in the Rocky Mountain area. Much of the success of a regional meeting depends upon the local chairman, and our Committee is to be congratulated on the choice of Blakey Helm as Louisville Chairman and W. J. Jameson for the Yellowstone event. The meetings at Atlanta and Dallas during the term of Cody Fowler last year were so highly successful that the aim of the present Committee is to maintain the previous records. Programs for entertainment and speakers are now in course of formulation.

The Board of Governors is receiving the benefit of an unusual degree of assistance from the Administration Committee. The Chairman of the House is Chairman of the Administration Committee, the other members being the Secretary and the Treasurer, with the President as an *ex officio* member. In addition to the function of taking such action as may be necessary between sessions of the Board of Governors, the Administration Committee is convening in advance of each meeting of the Board and submitting recommendations on many items more or less routine in character, thus saving a large amount of discussion and debate in the Board and making more time available for important questions of policy. Roy E. Willy, Chairman of the House, is entitled to much credit for the effective operation of the Administration Committee in this capacity. Another function given by the Board to this

Committee is the primary responsibility for the arrangement of Assembly programs at each Annual Meeting.

An important session will be held on February 23 when the Board of Governors meets with the Committees on Special Gifts, Ways and Means, Rules and Calendar, Scope and Correlation, Headquarters Building and the Board of Directors of the American Bar Association Endowment, for consideration of an enlarged Headquarters Building. This envisages a library of all bar association material, research facilities, a law center and library and a law quarterly written from the standpoint of the practicing lawyer. Starting on a modest scale, this project has the possibility of becoming one of the most important developments in the Association's history. You will hear more about it from time to time.

Addressing the Oklahoma Bar Association in Oklahoma City on the way to the West Coast, your President was in California for an entire week. The primary purpose was to pass upon final plans and arrangements for the Annual Meeting of next September in San Francisco. Incidental to this, he made six major addresses in five days at various points in California. All the way along the line great interest and enthusiasm were reflected in the San Francisco Annual Meeting. Stopping at Chicago for the Scope and Correlation meeting, he went on to New York for a session with Judge Medina and the Council of the Section of Judicial Administration, conferences with various committee chairmen and the annual dinner of New York County Lawyers Association in honor of Judge Learned Hand and Judge Augustus Hand.

I have been endeavoring for several months to find space on this page for a brief discussion of public relations and will do so now even though it may result in running beyond usual space limitations. The Chairman of each Committee and Section is likely to consider the work of his group the most important in

the entire Association. This is as it should be. Those of us who need to view the entire scene understand the relationship of each group to the whole picture and the fact becomes increasingly clear that the subject of public relations does have a direct bearing on the work of every other Committee and Section. On it depends the attitude of the public toward the profession, the influence of the Bar on national issues and the performance of the public duty of the lawyer. The American Bar Association has been rather late in realizing the importance of public relations. George M. Morris performed an outstanding service in bringing the issue to the front and from that time forward the work has been given real impetus.

The medical profession, confronted with direct threat of socialization, is spending hundreds of thousands of dollars on public relations. The danger of socialization was not realized until a late date. This is an insidious thing and the legal profession must be on its guard. The rubber industry has in effect already been socialized by the United States Government. John L. Collyer, President of the B. F. Goodrich Company, recently stated: "The government owns the rubber-producing plants, procures the raw materials and schedules production. It is the only buyer and importer of crude

rubber. It determines the amount of rubber that may be consumed by manufacturers; sets the specifications for the use of rubber, and determines the price."

It would be very easy indeed for the same result to be brought about in the case of the legal profession, with only 25 per cent of the practicing lawyers belonging to the national organization.

The essential purpose of public relations is to reveal the Bench and the Bar in their true light, to get others to see us as we see ourselves. This is no easy job and in order to accomplish the result the legal profession as a whole must be worthy of it. Words must be backed up with deeds, canons with acts. There is no use in proclaiming our virtues unless our daily conduct as lawyers and judges shows that we have virtues to proclaim.

There must be a product or a service that will support a public relations program. Good public relations are like good character and good health, originating from within and manifesting themselves from without. No amount of pious breast-beating can produce a favorable attitude toward the Bar in the general public. We must have good conduct or we cannot expect good reputation and without good reputation we cannot expect the trust of our fellowmen.

We hear much about the aptitude test. The character test is equally important. A few cause widespread criticism and suspicion of the profession and a public relations program would be much easier had stricter tests been applied over a period of the last fifty years. The combined effect of the work by our Committees and Sections will be to raise standards all the way along the line, enforce ethical conduct, improve the administration of justice and generally render better service to the profession and to the public. Here is the real basis of our public relations.

In support of this program the Public Relations Committee under the able chairmanship of Thomas L. Sidlo, of Cleveland, is pursuing the policy of making the role of the lawyer better known to the general public and more favorably regarded. We are hampered by lack of funds and are making the best possible use of the money that is available. We are establishing a long-term plan, hoping for some results at an early date, with assurance for the future resulting from continuity of effort. It links into the six-point program of ultimate objectives adopted last September upon recommendation of Scope and Correlation. This and other phases of public relations will be mentioned in the President's Page of a later month.

Pretrial Program Shows Progress

(Continued from page 118)

of the Judicial Conference Committee and Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, who has been responsible for the effective use of pretrial in that jurisdiction, have been leaders. In five recent meetings of the American Bar Association such pretrial demonstrations have been held and have attracted wide interest.

A recent development of great

importance is the publication by Baker, Voorhis and Company, Inc., of New York City, of the book *Pretrial* by Harry D. Nims of New York, who is chairman of the Section committee. That book has been circulated to a large number of the state trial judges through the help of two foundations. Judge Harold R. Medina, the Chairman of the Section, explained the purpose of the distribution in a communication to the judges who received the book (see 38 A.B.A.J. 46; January, 1952).

The Section is well aware that a more widespread use of pretrial will

come about only through better understanding of it by the Bar and through the support which will follow such understanding. Therefore, its efforts are being devoted to a large extent to educating the Bar on the advantages inherent in the procedure. As part of that plan the Section expects to publish a report of its pretrial committee next spring, giving a detailed statement of the extent of the use of the procedure in state and federal courts and bringing down to date the chapter in Mr. Nims' book reviewing reported decisions of the courts on pretrial.

John Winthrop:

A Great Englishman and a Great American

by the Rev. A. Brian Bird, A.K.C., J.P. • Vicar of Edwardstone and Rector of Groton, Suffolk

■ "We must not forget the great work John Winthrop did in taking with him the Common Law which is the basis of American justice today. He was also instrumental in taking our liberty and language with him."

These words were spoken by Mrs. Helena Normanton, K.C., first woman King's Counsel in Great Britain and an honorary member of the New York State Bar Association, at the Winthrop Tercentenary Commemoration at Groton, Suffolk, England, in September, 1949. It was one of the many tributes paid by eminent Americans and Britons on this three-hundredth anniversary of the death of John Winthrop.

Held in the rural Parish of Groton, Suffolk, where John Winthrop was Lord of the Manor and Patron of the Church, the celebrations were a fitting tribute to the memory of one of America's greatest forebears, one of the founders of America's legal system. The commemoration included a meeting, a church service and a play, *A Puritan Father*, based on incidents in Winthrop's life in Groton and in Salem, Massachusetts, which was produced and acted by the villagers. The whole proceedings were broadcast by the BBC, and found their way into several American radio programs.

As the organizer of the commemoration, as Rector of Groton, I can state without hesitation, that it was the inspiration of Winthrop's life

and example which provided the foundation for my work. The more I read about him and his character, the more I grew to honor and respect so great an Englishman who became so great an American.

"Old England's Loss Was New England's Gain"

Knowing as I do the small agricultural parish of Groton, set in the heart of rural Suffolk, with its pleasant, peaceful countryside and its quiet, soothing tempo of life, I am lost in admiration for the man who turned his back on all this, and went out to unknown lands, in the face of hardships and difficulties, to establish a new community. Leaving behind him the life of a country squire, magistrate and lawyer, and the happy environment of a Suffolk manor house, John Winthrop led the great Puritan emigration to New England in 1630. He had renounced his legal office in London, as his straight-forward nature could not tolerate the state of affairs which existed in both church and government circles. This liberal-minded, cultured Englishman had found that the lamp of liberty was beginning to burn low in England, so he sought out new pastures, where the freedom which he loved would be more fully realized. The old England's loss was the new England's gain.

It was perhaps, more than any-

thing, John Winthrop's love of liberty, combined with a strong sense of vocation, which drove him to take the bold step, at the age of 43, launching himself out, with others of like mind, in this great new enterprise across the seas. After the dissolution of Parliament in 1629, he became convinced that "evil times are come when the Church must flee to the wilderness". So the grave, scholarly country gentleman of Old England became the vigorous settler of New England, working with his hands, side by side with his comrades in the new venture. But Winthrop's genius was not of a practical nature only. His administrative ability and real gift of statesmanship were invaluable to the young colony, and his influence in forming its political and legal institutions was profound.

We in Groton are proud of John Winthrop and his memory. We have endeavored, in our commemoration, to show the world the beauty and greatness of his character, which was based on a profound love of freedom and justice. We are carrying on his memory by beautifying and restoring the old parish church of Groton, where Winthrop and his family worshipped for many years, and for which he showed so much concern as patron of the living.

As a result of generous support from both Britain and America during the Winthrop Tercentenary Commemoration, we have recently

installed a lovely little two-manual "Father" Willis Organ, which is contributing greatly to our services of worship. We hope, with continued support, to carry out further improvements and to make Groton Church a place of pilgrimage for all Americans in this country. We feel confident that this further support will be forthcoming from Americans

to whom the Winthrop tradition is something to cherish and maintain.

This great bond of common tradition, which both America and Great Britain share, was based on the work of men like John Winthrop. No more fitting message could be given to the leaders of both our countries, in these days of trial and anxiety, than these imperishable

words of Winthrop:

For we must consider that we shall be as a city set upon a hill. The eyes of all people are upon us, so that if we shall deal falsely with our God, in this work we have undertaken, we shall be made a story and a by-word throughout the world.

This is an inspiration to all of us as we face the uncertain days which lie ahead.

Committee on Law Lists

Issues Certificates

■ The following publishers of law lists and legal directories have received from the Standing Committee on Law Lists of the American Bar Association certificates of compliance with the Rules and Standards as to Law Lists, as to their 1952 editions.

Commercial Law Lists

A. C. A. LIST (OCTOBER, 1951-1952 EDITION)

Associated Commercial Attorneys List

165 Broadway
New York 6, New York

AMERICAN LAWYERS QUARTERLY

The American Lawyers Company
1712 N.B.C. Building
Cleveland 14, Ohio

B. A. LAW LIST

The B. A. Law List Company
161 West Wisconsin Avenue
Milwaukee 3, Wisconsin

CLEARING HOUSE QUARTERLY

Attorneys National Clearing House Co.

1645 Hennepin Avenue
Minneapolis 3, Minnesota

THE COLUMBIA LIST

The Columbia Directory Company, Inc.

320 Broadway
New York 7, New York

THE COMMERCIAL BAR

The Commercial Bar, Inc.
521 Fifth Avenue
New York 17, New York

C-R-C ATTORNEY DIRECTORY

The C-R-C Law List Company, Inc.
50 Church Street
New York 7, New York

FORWARDERS LIST OF ATTORNEYS

Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

THE GENERAL BAR

The General Bar, Inc.
36 West 44th Street
New York 18, New York

INTERNATIONAL LAWYERS LAW LIST

International Lawyers Company, Inc.

33 West 42d Street
New York 18, New York

THE NATIONAL LIST

The National List, Inc.
75 West Street
New York 6, New York

RAND McNALLY LIST OF BANK RECOMMENDED ATTORNEYS

Rand McNally & Company
536 South Clark Street
Chicago 5, Illinois

WRIGHT-HOLMES LAW LIST

Wright-Holmes Corporation
225 West 34th Street
New York 1, New York

General Legal Directory

MARTINDALE-HUBBELL LAW DIRECTORY

Martindale-Hubbell, Inc.
One Prospect Street
Summit 1, New Jersey

General Law Lists

AMERICAN BANK ATTORNEYS

American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

THE AMERICAN BAR

The James C. Fifield Company
121 West Franklin
Minneapolis 4, Minnesota

THE BAR REGISTER

The Bar Register Company, Inc.

One Prospect Street
Summit 1, New Jersey

CAMPBELL'S LIST

Campbell's List, Inc.
905 Orange Avenue
Winter Park, Florida

CORPORATION & ADMINISTRATIVE LAWYERS DIRECTORY

Central Guarantee Company, Inc.
141 Jackson Boulevard
Chicago 4, Illinois

INTERNATIONAL TRIAL LAWYERS

Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

THE LAWYERS DIRECTORY

The Lawyers Directory, Inc.
916-917 Union Central Building
Cincinnati, Ohio

THE LAWYERS' LIST

Law List Publishing Company
111 Fifth Avenue
New York 3, New York

RUSSELL LAW LIST

Russell Law List
10 East 40th Street
New York 16, New York

Insurance Law Lists

BEST'S RECOMMENDED INSURANCE ATTORNEYS

Alfred M. Best Company, Inc.
75 Fulton Street
New York 7, New York

THE INSURANCE BAR

The Bar List Publishing Company
State Bank Building
Evanston, Illinois

THE UNDERWRITERS LIST

Underwriters List Publishing Company
519 Main Street
Cincinnati, Ohio

(Continued on page 163)

Books for Lawyers

THOMAS JEFFERSON. By Nathan Schachner. New York: Appleton-Century-Crofts, Inc. 1951. Two Volumes (boxed). \$12.00. Pages 1070.

Thomas Jefferson throughout his long life was possessed of an insatiable intellectual curiosity which impelled him to investigate and study innumerable varied subjects. In several of these he was able to attain a high degree of proficiency, not only because of his exceptional mental capacity, but also through his marvelous powers of concentration and application, "the finest democratic mind in this nation's history". He quickly became the leading exponent in the colonies of theories of government and institutions; the rights of men to religious freedom, to education and to self-government; and the practicalities of public administration and of politics. At the youthful age of 33 Jefferson attained eternal fame as the author of the Declaration of Independence, "the most influential document the world has ever seen". He gave an impetus to self-government in the modern world unequalled by the contribution of any other person; and under his inspiring leadership the colonists were able to create a broader basis for self-rule than any people had achieved since the days of the young Roman Republic. His Declaration of Independence (a more far-reaching pronouncement than Magna Charta) was given reality by the military genius, the fighting qualities and the character of George Washington and by the adoption of the Constitution, of which another Virginian, James Madison, was the chief author.

Jefferson's next most important contribution to the greatness of his country was his acquisition for it of

the vast area west of the Mississippi through the Louisiana Purchase. He was the founder and for many years the undisputed leader of the Republican Party, which under Andrew Jackson became known as the Democratic Party.

Jefferson was an able diplomat, serving his country for five years as Minister to France. His private library was no doubt the most extensive and carefully selected in America. He was a student of archaeology and astronomy, a geologist, a naturalist and a horticulturist. He was an artist in landscape gardening; he experimented in scientific agriculture (bringing many foreign plants to Virginia), and in animal breeding. He invented a plow which revolutionized plowing. Jefferson was an excellent violinist. An architect of exceptional ability, he designed his home at Monticello, the Rotunda of the University of Virginia (which he founded), the State Capitol in Richmond, and the homes of Madison, Monroe, John H. Cocke and others. As a youth he developed his own religion on a basis of independent thinking. His writings are now being edited and published in fifty-two volumes at Princeton University.

Today as our attention and energies are increasingly focused upon democracy, with the gulf widening between free nations and the tyrannies that rule with an iron hand behind an iron curtain, we turn constantly to Thomas Jefferson for the stimulus of his ideas and his belief in the inherent right of men to be free.

This introduction is written in the hope that the present review may lead lawyers to a better acquaintance with this great American, himself a lawyer, and to inform themselves of

his relation to the stirring events which he helped direct. They will find Nathan Schachner's new life of Jefferson informative and rewarding. It is not a profound psychological study. Nor is it so scholarly a work as Dumas Malone's *Jefferson*, of which two volumes have been published, with three more to follow. Mr. Schachner seems at times to overemphasize Jefferson's errors and inconsistencies. He goes far in giving Aaron Burr the benefit of the doubt (although the court did likewise in Burr's trial for treason), holding Jefferson more vindictive and Burr more blameless than the evidence warrants. Mr. Schachner has previously written a sympathetic biography of Burr and likewise one of Alexander Hamilton, Jefferson's two most bitter and most potent enemies. (Both enemies were removed by Burr's bullet which ended Hamilton's life.) Mr. Schachner has long been a student of this era; his *Jefferson* is well-documented and shows careful study; he throws new light upon some phases of Jefferson's character and career. One instance is the following observation:

Nothing could be more remote from the truth than the general portrait of Jefferson as the philosophical idealist who permitted a vague humanitarianism and pacifism to sway his dealings with the world. He could be as hard-boiled, as practical and as cynical, if you will, when the occasion arose as any veteran diplomat of the Old World.

Jefferson was warm-hearted, attractive to both men and women. He was passionate, with a fiery temper, which he kept well under control, and a high sense of honor. Jefferson's description of Washington applied equally to himself: "a man of strong passions, eternally repressed". Throughout his mature life Jefferson suffered intensely from migraine headaches, which sometimes incapacitated him for a month at a time. He was afflicted with more than one domestic tragedy in his own family.

Mr. Schachner depicts Jefferson's everyday life as a student at William and Mary College, lively but more studious than most. He had already

begin to show that vigor of mind and of body inherited from his ancestors, the Jeffersons and the Randolphs. Mr. Schachner stresses his interest in the classics and in languages. He read Greek and Latin authors in the original, as well as French. He had some acquaintance with Italian and Spanish. He was partial to the study of Anglo-Saxon, partly because from it stemmed many legal phrases: he even essayed the writing of an Anglo-Saxon grammar. (Incidentally, this reviewer as a college student found Anglo-Saxon more difficult than Latin or Greek.) To his Anglo-Saxon ancestors Jefferson attributed all the virtues, ascribing the contemporary corruption in England to the Normans.

After five years devoted to the study of law and government under George Wythe, an eminent Williamsburg lawyer, Jefferson was admitted to the Virginia Bar. During his first six years of practice in Williamsburg he earned in fees £2,177 sterling, but collected only £792. As this ratio of earnings and collections continued for another year or two he became so disheartened that he turned over his clients, 132 in number, to Edmund Randolph, and abandoned the law. Before taking this step he had joined five other leading Virginia lawyers in publishing a notice to clients that "after October 10, 1773, we will not give an Opinion on any Case stated to us but on the Payment of the whole Fee". As a youthful member of the Virginia legislature Jefferson was commissioned to codify the English common law and the British statutes in force at the time the Virginia legislature was established. At this time he also introduced his famous bills for religious freedom and for public education. He was "the proud aristocrat and the spokesman for the common man".

Jefferson came into conflict with the judiciary during his first term as President; he was infuriated by the *obiter dicta* of Chief Justice Marshall in *Marbury v. Madison* that the Supreme Court could declare an Act of

Congress unconstitutional and void; on another occasion he wrote Joseph C. Cabell that the judiciary "either has too much power or holds it under too little responsibility".

Reference should be made here to the events which brought Jefferson's second term as President near to disaster as they are illuminated in this biography. On June 22, 1807, a British war vessel off Hampton Roads, without any warning except two shots, shelled the new American frigate, *Chesapeake*, for fifteen minutes at a distance of 150 feet, killed three members of the crew and wounded eighteen others, including the captain. Thereupon the British forcibly removed three sailors, on the ground that they were British subjects. The news of this outrage inflamed American opinion to the point where war would surely have been declared against Great Britain, since her Foreign Minister refused an apology, had the President called Congress to convene. In an extreme effort to prevent war, for which he considered our country unprepared, Jefferson tried economic pressure in an Act forbidding all commercial intercourse and communication with Britain. The effect on our trade and shipping proved so costly that a strong secession movement in New England strove to use Aaron Burr for the purpose of inducing New York to join with the New England states in seceding and forming a new Confederacy. A war in 1807, when the country was strongly united for it, would have been preferable to waiting five years when our people had become disunited and were handicapped by a weak military leadership. The determination to avenge the shelling of the *Chesapeake* still obsessed many young Americans. Two of them, Henry Clay and John C. Calhoun, in 1812 when they were in Congress, forced through a resolution declaring war against Great Britain which President Madison signed.

Jefferson was offered a third term, despite the effect on his popularity of his Embargo Act. He declined for

the same reason Washington had refused; they considered that no President should serve more than eight years. He continued, however, as an unofficial adviser to his party and to his country for eighteen years after he left office. On the fiftieth anniversary of the Declaration of Independence, July 4, 1826, at the age of 83, "after one of the most extraordinary lives in history, Thomas Jefferson . . . departed from the mortal stage and assumed his place among the immortals".

CHARLTON OGBURN
New York, New York

JUSTICE AS FOUNDATION OF SOCIETY AND CHALLENGE OF CIVILIZATION. By Ruby R. Vale. San Francisco: C. W. Taylor, Jr., Pages 869 to 1285.

This is the fourth of Dr. Vale's monumental works on the foundations of society. The first three, on *Understanding*, *Purpose* and *Cconciliation*, were published some years ago. The present volume deals with Justice in all its relationships and manifestations.

When the publisher sent me this volume with the request that I review it, I agreed thinking it would be a pleasant week-end task to read four hundred pages about justice. It has taken a good deal of my spare time for six weeks and could easily be the subject of study for a year.

Dr. Vale is obviously a classical scholar, for in this work he deals not only with the fundamentals of law, justice and civilization, but here and there in apt relationship refers to one or another of the great philosophies of the ages. There is no padding in this book. Many times with one apt word he characterizes a man, a nation, a period, or a philosophy. For instance, in speaking of Western cultures, he says:

Egyptian stability, Grecian harmony, Athenian liberty, Roman law and order, medieval unity, renescent nationalism, revolutionary rights of man, political freedom under constitutional government, representative democracy, modern totalitarian communism, present-day socialistic statism and the instant universalism of

religious and world organization of nations are dominant ideals which have swung or now move the ponderous pendulum of the state in mass action.

As another example he applies his precise judgment to some of the philosophers, as follows:

Hobbes may emphasize fear of authority and Austin authority of sanctions, Spencer struggle for life and Marx strife of classes, Kropotkin mutual aid, Bain sympathy, Smith self-interest, Bentham utility, Freud sex and Watson mechanism. . . .

Or, if you would like a short summary of the beginning and development of the idea of government of, by and for the people, we have this:

The Renaissance gave to the growing middle class the knowledge of sovereign power which Marcellius discerned in the people, and also, of a fundamental concept of Aquinas—that government exists for the good of the governed. . . . Hardly a ripple resulted when this. . . . most momentous concept of human association was cast on the stream of human thought. . . . Finally, however, it came to the attention of the receptive minds of Bodin, who emphasized the dominance of the state over the church, and of Hooker, who applied the democratic concept of ecclesiastical policy and gave to religious organizations the principal of self-rule. Harrington, Locke and Kant made civil government by free men the foundation of political institutions, which Rousseau and Voltaire in France and Paine and Priestly in America and England converted into the revolutionary ideas of the sovereignty of the people, the equality of man, individual freedom, private property and the general welfare.

Dr. Vale does not give his entire attention to justice in an ancient and medieval setting. With his discussion of incentive taxation in the recent revenue laws he comes right down to date and presents his belief that the interests of capital and labor are not conflicting but may be solved by a proper formula relating to the distribution of profits.

In dealing with justice and its application to concrete situations through applied law, Dr. Vale comes naturally to world justice and the organization of the United Nations. Needless to say, his assertion that the

veto must be renounced by the Big Five nations, or its exercise limited, finds acceptance with this reviewer, who, as legal consultant to the American delegation at San Francisco and with the concurring support of a majority of the official consultants, proposed that there be no veto but that final action in the Security Council be had by a three-fourths majority; otherwise, aggressors would, by the veto, frustrate the purpose of the entire organization.

As stated in the beginning, it is my opinion that Dr. Vale's monumental work may profitably be made the basis of institutional teaching or self-study by those interested in the history, development and future of civilization, for, as the main end of animal existence is survival, the main end of civilization must be justice.

DAVID A. SIMMONS

Houston, Texas

[Editor's Note: This review of the fourth volume of Dr. Vale's work was found among Mr. Simmons' papers after his untimely death last spring. Although the volume was published some time ago, the JOURNAL feels justified in printing the review because of the importance of the work and the value so many of our readers placed on Mr. Simmons' judgment.]

STANDARD CODE OF PARLIAMENTARY PROCEDURE. By Alice F. Sturgis. New York: McGraw Hill Book Company, Inc. 1950. \$2.50. Pages 268.

I read Mrs. Alice F. Sturgis' book *Standard Code of Parliamentary Procedure* while on the train returning from Miami where cruel fate and stern duty had compelled me to go for a tax conference during an ice and snow blizzard in my home city of St. Louis. To anyone who is fortunate enough to have the book already, no review would be needed other than the Foreword by Justice Burton, and the Introduction by former Justice Roberts. The unqualified endorsement of such authority should be sufficient guaranty of the worth of the book. As the author herself points out, a parlia-

mentary manual is not intended as a technical device for the entanglement of the uninitiated, or the defeat of the will of the majority by skillful maneuvering. It could be added that the area is one in which a smattering of knowledge is capable of creating conditions of great confusion. It was obviously with a consciousness of this and a clear sense of responsibility that the book was produced.

When I came to the chapters on motions, I was reminded of the plight of a certain women's organization about which a woman told me with great amusement. At an annual election a sweet lady dark horse had been chosen for the new president and had taken her place at once to preside. Although she modestly admitted her incapacity to deal with complicated problems in her inaugural remarks and bespoke their forbearance, it was not long before the women were at it in dead earnest and the situation well out of hand. A motion made on a controversial issue was quickly followed by an amendment. The partisans of the mover offered an amendment to the amendment, but another lady offered a substitute for the first amendment, which appeared to introduce an entirely new idea, maybe new subject, and was promptly challenged from several quarters upon the point of order. While the bewildered new president was trying weakly to straighten out the parliamentary situation, a woman with a particularly bright idea arose and suggested that there was no quorum present under by-law requirements anyway, and that whatever they did would be tainted with invalidity, even if they should be able to do anything. This stopped the proceedings temporarily while a search was made for the by-laws. None being in the room at the moment, it seemed that an impasse was inevitable. At this juncture a motion to adjourn came from several places. But a voice rising above the din asserted that the motion to adjourn itself was out of order because of the pendency and debate upon another main motion.

The harrassed presiding officer turning to the retiring president asked: "What do I do now?" "You should get called to the telephone", the ex-president said. When she came back, they had accomplished the adjournment. It had looked for a time as though the members were going to miss their dinners for inability to dissolve the meeting.

One has only to close his eyes to conjure up a comparable scene at a local bar association meeting with some procedural issue or neosocial program at stake. The women themselves are sometimes edified with the performance of lawyers at some of our bar meetings. Possibly there is no other group which could be assembled in which the members would be more concerned with the manner or method of accomplishing something which they all or the greater majority present want done. Most members of the profession are imbued emotionally with the principle of open, free discussion and fair (endless) debate. In her chapter on debate, Mrs. Sturgis appropriately asserts that "the right of every member to be heard, to participate fully in the discussion of any matter of business which comes before the assembly, is one of the fundamental principles of parliamentary law." She has added, perhaps a little ingeniously, that: "a knowledge of the rules governing debate is, therefore, essential to every member to enable him to exercise his rights fully".

Her broad classification of those motions that are undebatable seems orthodox. Simple procedural motions, such as temporary postponement (lay on table), or for immediate vote (previous question) are given as examples of undebatable motions. I should be content to see the "lay on table", and "previous question" business discarded completely as descriptive titles.

Again in Chapter 23 the author calls attention to the sometimes exasperating "motion to reconsider". The author intimates that the motion may be made by any qualified member regardless of how he voted

on the original motion. This is a point as to which there is not full agreement among the authorities. In fact it is left a little obscure in the text here with the statement that "the courts have held that it is not necessary for a member to have voted on the prevailing side in order to move to reconsider *unless objection is made*". . . . In view of the fact that Robert's Rules and Cushing's Manual are not in agreement upon this point of practice, careful draftsmanship would prompt its coverage in the by-laws of amateur deliberative bodies.

It is not to disparage the current manuals to observe that Mrs. Sturgis' book is much more than a manual. The treatment and grasp of the subject of parliamentary procedure is that of a lawyer-trained mind. The opening sentence of the book gives clear insight into its fundamental aims: "A knowledge of the basic principles upon which parliamentary law rests enables one to reason out the answers to most parliamentary questions."

Naturally any lawyer, when called upon to preside, would prefer to rest upon an understanding of the problems arising in course of the meeting rather than upon a handy manual kept conveniently for furtive reference. The book contemplates that the presiding officer will think as he presides, and with a knowledge of the applicable law as a part of his advance equipment, will rely upon his reason rather than his memory. Mrs. Sturgis' treatment proceeds upon this theory and supplies the means to accomplish it.

JACOB M. LASHLY
St. Louis, Missouri

I AND CLAUDIE. By Dillon Anderson. Boston: Little Brown and Co. 1951. \$3.00. Pages 247.

I and Claudie is not a book about the law, nor is it a book about lawyers, and it is certainly not simply because its author, Dillon Anderson, is a lawyer that it is being reviewed here. It is because this is not simply one lawyer's book. It is a lawyers' book, and for two very good and different reasons.

Though this book is not autobiographical, yet Dillon Anderson admits that he is sometimes sorry it is not. So you can easily see how his personality and his attitude toward life show through. This is one reason for its legal significance. Here you see that lawyers can be broad-minded and generous-spirited and, barring the necessity of earning a living, that they would rather work for the ordinary fellow than for the rich man or the big corporation. Here too you can see how the versatility of a man can be evoked by the practice of law. His imagination is stimulated and his English perfected so that he can create and tell about people and their doings with the same fine workmanship and conscientious detail that he writes a brief on behalf of a corporation client accused of violating the Sherman Act or prepares a registration statement.

The other reason is that "I" and Claudie have all the attributes of the perfect client—except one, for they are chronically incapable of paying a fee, any fee at all. They meet, and the story starts in New Orleans, but it moves almost at once to Texas, when three "big mean-looking cops" come looking for them with summonses. So their adventures move to Texas and all over Texas—or so it seems to Easterners, who can never learn how big Texas is—and in and out and around more happy gaudy troubles and flirtations with the law than any Easterner, even a lawyer, can imagine there could be, even in Texas.

The Saturday Review of Literature concludes about *I and Claudie* and the author that it is well that Lawyer Anderson was on the side of his characters in view of the legal difficulties with which they flirted. Any one who knows Dillon Anderson knows that he would always be on the side of such happy-go-lucky fellows as Clint and Claudie, whether the product of his own pen or not.

There is no point in even trying to list their adventures, but we may just indicate their talents. Claudie's are few and simple and substantial. He has a big build, a country bass

voice, and as much of an eye for women as they have for him; and it becomes clearer and clearer that he is a philosopher. Clint—he's "I"—is more versatile. If you ask him for his line of business, he will tell you, "I have tried not to limit myself. I have tended bar, I have sold fire extinguishers, patent medicines, and lighting rods, and I have tuned pianos. Also, I am an actor. I have written, though I have not chiseled, tombstone epitaphs, and once, in Flomaton, Alabama, I cured a colored man that had fits. I have sold Jewel tea and trained Tennessee walking horses. . . . I can read the Morse code. I can play a mandolin, and I can preach a fair sermon from either the Old or the New Testament. I do not do manual labor. My friend Claudie here handles that for me and sings bass."

But there is more to this book than edification for the lawyer and entertainment for the layman. This is not just a collection of tales. It is a sort of picaresque novel. And it is more than that too, for both Clint and Claudie are much more than rogues and vagabonds. There is a flicker of Don Quixote about Clint, and more than a flicker of Sancho Panza about Claudie. Cervantes would have relished this book, and so will you.

CHARLES P. CURTIS

Boston

HARRISON TWEED

New York City

DEFENDER'S TRIUMPH. By Edgar Lustgarten. New York: Charles Scribner's Sons & Co. 1951. \$2.75. Pages 238.

Pull out all the stops, dust off all the adjectives, this is it—the finest bit of arm-chair reading for lawyers that has come down the pike in many a year!

Defender's Triumph in a very real sense is also Lustgarten's triumph. This description of four famous English trials is assuredly one of the best of such accounts that has ever been written. It is entertainment of the highest order, gripping, fascinating and, withal, instructive.

It is a time-worn cliché to say that truth is stranger than fiction; but in

Defender's Triumph Lustgarten has not only shown the proof of that statement but has also demonstrated that, properly portrayed, truth is more entertaining than fiction. As told by Lustgarten, the stories of these four murders are more entrancing than any of the productions of the Crime Club and the skillful cross examinations of these English masters makes Perry Mason look like an elephant trying to do a toe dance.

It is said to be one of the tragedies of Anglo-American law that its various histories have been written by lawyers who were not historians or by historians who were not lawyers. Mr. Lustgarten is singularly fortunate in that he possesses both a novelist's insight and skill in telling a tale as well as a lawyer's technical knowledge of the law and of the way a courtroom operates. The result enables Mr. Lustgarten to tell the story of a trial with a delicacy of touch and a penetrating insight that is unique among the writers of trials.

The four murder trials portrayed in *Defender's Triumph* are all good stories and interesting trials. Under Mr. Lustgarten's deft handling, these stories are all the more interesting because they are told with a lawyer's grasp of the significant as distinguished from the colorful inconsequential, and the trials are all the more fascinating because the legal problems have been given the appropriate dramatic touch through the novelist's skill.

All in all, it would be difficult to find a more fascinating book for a lawyer, or one which can give him so much delightful reading; and yet with all its dramatic force and gripping fascination, *Defender's Triumph* must inevitably induce in any thoughtful reader a somber reflection. Here are portrayed outstanding triumphs by four masters of the courtroom. Yet how many lawyers today in the United States can identify the names of Edward Clark, Marshall Hall, Patrick Hastings and Norman Birkett? This reviewer must confess that Hall's name alone was familiar to him and probably the same is true of many other lawyers in this coun-

try, just as there are probably few members of the English Bar who can readily call to mind Albert Fink, Clarence Darrow, William Fallon or Arthur Garfield Hays.

What a contrast thus exists between the practitioners of the law and the writers of the law. Few of us have heard of these eminent practitioners, yet there is surely not a lawyer in America who does not know Blackstone and most of them have heard of Lord Coke and Lord Mansfield, while undoubtedly a great majority of the English Bar are acquainted with Holmes and Gray and possibly even Cardozo. One is forcefully reminded of the words of Holmes when he spoke of "the secret isolated joy of the thinker . . . the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army."*

Fascinating these trials may be, but having closed the book one cannot help but think: How fleeting is the fame of the advocate and how soon is his nine days' triumph forgotten.

CHRISTIAN M. LAURITZEN II

Chicago, Illinois

THE INVESTMENT COMPANY AND THE INVESTOR. By Rudolph L. Weissman. New York: Harper & Bros., Inc. 1951. \$3.50. Pages 217.

What are the fundamental reasons for the remarkably fast development of investment companies in the last decade? What is their record of performance in specific cases? How do they operate? What is the aggregate value of assets held, and by what number of shareholders?

These are some of the challenging questions considered in this recently published book by an authority on finance. The author, Rudolph L. Weissman, has special qualifications for writing, in a readable and informative manner, on many of the

*From speech to Suffolk Bar Association dinner, February 5, 1885, printed in *Collected Legal Papers*, page 32.

unique aspects of this relatively new development in the field of corporation finance. Although trained as a lawyer, he has the requisite Wall Street background, having served on the staff of the Securities and Exchange Commission and as an officer of a firm of investment counsel.

In a fair and objective way, the author has explored the area of investment companies, fully recognizing that the subject matter has been undergoing rapid change. There is a distinct need for a book like this which gives something more than is commonly found in existing promotional literature. His purpose to present a study of mutual funds on a level which the layman can comprehend has been completely fulfilled. Unlike manuals dealing with the subject, this brief work provides not only the essential background material, but a series of nontechnical conclusions based on a critical evaluation of many of the leading companies. The author's approach by no means is premised on a deification of the mutual companies as a medium of investment for both small and large investors.

Tracing the evolution of the collective investment concept in both England and America, the main facts of their long experience are sketched. We learn from such experience that investment management under the supervision of a group of responsible experts generally can show better performance over a period than can the individual investor. This explains, to a large extent, why the mutual fund idea has taken such a hold during the past decade, so that these companies now own assets aggregating three billion dollars.

In a chapter aptly entitled "Washington and Wall Street", a brief review is made of the Investment Company Act of 1940, which governs the operations of these companies. How this complex piece of legislation has actually operated during the past ten years under the regulatory eye of the S.E.C. is adequately yet not exhaustively examined. An analysis is also made of

the invaluable S.E.C. report on investment companies. Here a wealth of material in this field has been explored, and supplemented by a pragmatic discussion of some of the major problems affecting this type of organization.

Following a survey of some of the fundamental factors relating to investment companies—the securities owned, costs of management, earnings, taxes and dividends—several case studies are presented. An evaluation of four representative closed-end and open-end mutual companies is provided. Thus, the functioning of the Massachusetts Investors Trust, one of the earliest and largest of investment funds, is based on a tabulation of its activities over a quarter of a century. This mutual fund, with over ten million of its shares outstanding, has by reason of this size alone, a sense of its serious responsibilities in the investment of "other people's money". Recognizing this, its philosophy is that it will support industrial management when it is right and use its voting power to criticize it when it is incompetent.

For lawyers and other professional men entrusted with funds to invest, the volume is a valuable guide, setting out for the intelligent investor the advantages and disadvantages of mutual funds. Treating the position of common stocks as a medium for investment for fiduciaries, trust funds, pension plans, etc., some recent significant trends are examined. Mention is made of the adoption in many jurisdictions of legislation to liberalize the prudent-man rule. Thus, in New York, recent legislation authorized the investment of trustees' funds in common stocks within fixed limits. The pattern has been established whereby trust funds may have access to the shares of mutual funds registered under the Federal Investment Company Act.

For the thrifty investor, the book is helpful in demonstrating the validity of the underlying idea of investment companies. In an easy-to-read fashion, the author indicates

that these mutual funds afford a sound haven with reasonable security of principal, good management based on diversification of portfolio. They provide a reasonable and regular income with a minimum of risk. In these days of insecurity, such worthwhile objectives should be made known; this has been done commendably by this book.

ALEX M. HAMBURG

New York, New York

UNJUST ENRICHMENT. By John P. Dawson. Boston: Little, Brown & Company. 1951. \$4.50. Pages 201.

This is a collection of a series of lectures delivered by Professor Dawson of the University of Michigan Law School at Northwestern University School of Law in April, 1950, on the general subject of restitutionary remedies.

Professor Dawson, who has written quite extensively in this field and who teaches the course in restitution at the Michigan Law School, traces the history of the remedies used from the days of early Roman law to recover from one who has been unjustly enriched at the expense of another. He analyzes in detail the restitutionary actions available through the centuries in European countries and then studies the growth of the remedies in the United States to recover from unjust enrichment.

This is not a detailed discussion of the requirements and uses of present day restitutionary methods but rather is more concerned with a study of their history and developments. Those with a knowledge of quasi-contract, constructive trust, equitable lien, subrogation and equitable accounting and who want to clarify their understanding of these remedies will find this book most useful.

Professor Dawson's informal style of writing with occasional and appropriate sparks of humor adds to the interest for his reader. Forty pages are devoted to citations of authority and cases giving the book excellent reference value.

CHESTER J. BYRNS

Chicago, Illinois

PRODUCTS LIABILITY AND THE FOOD CONSUMER. By Reed Dickerson. Boston: Little, Brown and Company. 1951. \$7.00. Pages 303.

The first study devoted exclusively to the important topic of food product liability has appeared in the form of Reed Dickerson's useful volume. An examination of food, drug and cosmetic product liability, which has been announced¹, is not yet in print but should form a basis for comparison which does not now exist. There are several books, listed in Appendix D of Dickerson's monograph, which include food product liability among the topics covered, but none are so thorough as Dickerson is. Apparently all the more than 1000 American cases as well as many English cases have been analyzed in the preparation of the book as well as the law review sources, annotations and the looseleaf materials.

The Introduction describes the scope of the inquiry as "... the individual consumer's civil remedy in food cases ..." (page 14) and properly orients the consumer in relation to the economic and legal structure in which he gropes.

The responsibility of the retailer for unwholesome food is first considered from its common law origin to the warranty provisions of the Uniform Commercial Code² and is summarized on the basis of the cases:

But the current trend is to hold the retailer to the liability of an insurer, even for latent defects, and to make this responsibility an instrument of social control [page 89].

The responsibility of manufacturers and wholesalers is next discussed and the legal distinctions between the two are analyzed in the light of economic fact. Dickerson concludes that an absolute liability

by warranty for unwholesome food is being matched by an absolute liability in tort for negligence, though privity in the former case and proof in the latter are formidable hurdles for plaintiff consumers.

After covering the responsibility of the restaurant keeper for unwholesome food, Dickerson attacks the basic question of what is "fit to eat". The test he urges is one of reasonable expectation on the part of the consumer which covers the troublesome cases the test of so-called "naturalness" produces: the oyster shells in the canned oysters, the turkey bone in the dressing and so forth. A thorough examination is made of the confused state of the law on liability for trichinosis and in place of this confusion Dickerson urges that trichinous fresh pork be considered legally defective until adequate warning of the necessary cooking be given to the consumer.

The book up to this point is principally a manual, describing the existing law in detail and with precision: Chapter V goes beyond this to question the adequacy of the civil action in food cases, pointing out that

... the pressure of civil claims helps to protect the consumer only from the more violent and dramatic injuries. It does not assure him a fully wholesome product, nor even one that is acceptable under minimum standards of wholesomeness [pages 259-260].

The further safeguard of effective administrative regulation of the food industry is required.

While recognizing fully the problem not only of the completely faked claim but of the more insidious exaggerated claim as well, Dickerson would not rely on the tangle of privity rules and problems of proof which bedevil the bona fide claimant as well as the "claim artist" today in most states. Instead he holds square-

ly with the Uniform Commercial Code that

... absolute liability [for food sellers] without privity limitations should be squarely adopted. The step is not a big one but it will sharpen the consumer's action and do away with the confusing intrusion of issues that are not actually being tried [page 262].

For the false claim specific procedural devices are available, such as pretrial examinations, and non-legal devices such as the index of claims maintained by the insurance companies.

To spread the risk or loss from claims by focusing civil responsibility it is suggested that all parties in the chain of manufacture and distribution be made absolutely responsible for the quality of food handled, with appropriate actions over where necessary, so

... the way is paved for reaching the person who is in the best position to correct the defect [page 277].

Products Liability and the Food Consumer could not have been published at a better time. Counsel for both plaintiffs and defendants in food cases can use its careful marshalling of authority and all lawyers can look to it for guidance in the current controversy over whether the warranty provisions of the Uniform Commercial Code should be adopted.

Such monographs as these bring the debate over provisions of the Code down to a legal rock bottom of fact and analysis and should be matched for other controversial portions of the Uniform Commercial Code.

WILLIAM TUCKER DEAN, JR.

New York University

1. The Food Law Institute, Inc., *Second Annual Report* (1951) 19.

2. The American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code*, §§ 2-313 through 2-318 (1951).

Review of Recent Supreme Court Decisions

George Rossman • EDITOR-IN-CHARGE

CITIZENS

Nationality Act of 1940 Prescribes Exclusive Procedure for Cancellation of Citizenship

■ *Bindczyck v. Finucane*, 342 U.S. 76, 96 L. ed. Adv. Ops. 71, 72 S. Ct. 130, 20 U. S. Law Week 4019. (No. 18, decided November 26, 1951.)

The Circuit Court of Frederick County, Maryland, issued a certificate of naturalization to Bindczyck in December, 1943. Seven days later on the Government's motion, the court vacated its order awarding citizenship on the basis of evidence *dehors* the record that it had been obtained by fraud, exercising its general power under Maryland law to set aside judgments during the term of court in which they are rendered. Its action concededly did not satisfy the requirements of Section 338 of the Nationality Act, 54 Stat. 1137, 8 U.S.C. § 738, which makes specific provision for revocation of orders awarding citizenship. Bindczyck obtained a judgment from the District Court for the District of Columbia declaring him to be a citizen of the United States. The Court of Appeals reversed. The Supreme Court reversed and reinstated the order of the District Court.

Mr. Justice FRANKFURTER, speaking for the Court, held that Section 338 is the exclusive procedure for cancelling a certificate of naturalization on the ground of fraudulent or illegal procurement based on evidence not appearing in the record. He finds in the history of the statute a clear congressional purpose to end the evils inherent in widely diverse naturalization procedures, citing instances of irregular naturalizations or denaturalizations which led to passage of the statute. He declared: "If the requirements specifically defined in § 338 for revocation of citizenship were to be supplemented by State law regarding control over judgments by way of the 'term

rule' or otherwise, the retention of citizenship would be contingent upon application of myriad discordant rules by a thousand judges scattered over the land." It was argued that this portion of the statute was similar to another portion which had been held to permit appeals to be taken to state courts and it was pointed out that there were diversities among the states in the time allowed for appeals. To this, Mr. Justice FRANKFURTER replied that those "differences are within a narrow and unimportant range compared with the enormous and quixotic differences relating to a court's control over its judgments on the score of fraud or illegality. . . . It is not to be supposed . . . that . . . Congress would gratuitously abandon the constitutional mandate to establish 'an uniform Rule of Naturalization'".

Mr. Justice CLARK and Mr. Justice MINTON took no part in the consideration or decision of the case.

Mr. Justice REED wrote a dissenting opinion in which Mr. Justice BURTON joined. They found nothing in the statute to justify a holding that Congress intended to "affect the power of state and federal courts to grant new trials or rehearings or set aside orders during a term or within such other limited time as statute or practice may prescribe".

The case was argued by Joseph A. Fanelli for Bindczyck, and by James L. Morrisson for respondents.

CONTRACTS

Decision of Question of Fact by Department Head Under "Finality Clause" of Standard Government Contract Held To Be Conclusive Unless Fraud Is Alleged and Proved

■ *United States v. Wunderlich*, 342 U.S. 98, 96 L. ed. Adv. Ops. 67, 72 S. Ct. 154, 20 U. S. Law Week 4017. (No. 11, decided November 26, 1951.)

Respondents agreed to build a dam for the United States and entered into a contract with the Govern-

ment which contained the usual "finality" clause: ". . . all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned . . . whose decision shall be final and conclusive upon the parties thereto". A dispute arose, concededly involving a question of fact, which was resolved in favor of the Government by the department head concerned, in this case the Secretary of the Interior. Respondents brought suit in the Court of Claims, which set aside the Secretary's decision on the ground that it was "arbitrary", "capricious" and "grossly erroneous".

The Supreme Court reversed in an opinion written by Mr. Justice MINTON, who reviewed previous decisions on the point, declaring that the Court "has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved". He noted that there was no pleading of fraud, no finding of fraud and no request for such a finding. "We assume", he said, "that if the evidence had been sufficient to constitute fraud, the Court of Claims would have so found. In the absence of such finding, the decision of the department head must stand as conclusive. . . ."

Mr. Justice DOUGLAS, joined by Mr. Justice REED, wrote an opinion dissenting on the ground that the rule espoused by the Court gives the department head uncontrolled discretion over another's fiscal affairs.

Mr. Justice JACKSON wrote a dissenting opinion in which he said: "I think that we should adhere to the rule that where the decision of the contracting officer or department head shows 'such gross mistake as necessarily to imply bad faith' there is a judicial remedy even if it has its origin in overzeal for the department, negligence of the deciding official, misrepresentations—however

Reviews in this issue by Rowland L. Young.

innocent—by subordinates, prejudice against the contractor, or other causes that fall short of actual corruption.”

The case was argued by Solicitor General Philip B. Perlman for the United States, and by Harry D. Rudiman for respondents.

CRIMINAL LAW

Judgment of State Court Dismissing Writs of Error Brought for Review of Convictions Resting upon Allegedly Illegal Confessions Reversed and Remanded

■ *Jennings v. Illinois, LaFrana v. Illinois, Sherman v. Illinois*, 342 U.S. 104, 96 L. ed. Adv. Ops. 105, 72 S. Ct. 123, 20 U.S. Law Week 4038. (Nos. 95, 96 and 375, decided December 3, 1951).

The petitioner in each of these cases is an inmate of an Illinois penitentiary. Under the Illinois Post-Conviction Hearing Act (which provides a remedy for any person “imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution. . .”), they filed petitions in Illinois courts alleging that confessions introduced at their trials had been obtained by force and violence. The state filed motions to dismiss on the grounds of *res judicata* and failure to state a cause of action. The trial courts dismissed each petition and the Illinois Supreme Court dismissed writs of error without argument and without opinion.

In certiorari proceedings before the United States Supreme Court, the state conceded that petitioners’ allegations raised a question of federal rights and they were entitled to have the factual issues resolved, but it argued that its statute was not an appropriate remedy for consideration of claims that were or could have been adjudicated at petitioners’ trials.

Speaking for the Court, the CHIEF JUSTICE agreed that the right to raise a federal claim might be forfeited by failure to make a timely assertion of it and that petitioners

were bound to invoke and exhaust the remedies provided by the state before they could seek redress in a federal court. He found, however, that Illinois practice required submission of a transcript of the proceedings along with a petition for writ of error when a case was to be presented to the state supreme court for review. Since petitioners were paupers, unable to pay for such a transcript, the CHIEF JUSTICE found that a writ of error was not available to review their claims. He declared: “. . . if writ of error was not available to petitioners and if . . . the Post-Conviction Act does not provide an appropriate remedy in this type of case, there never has been, and is not now, any state post-conviction remedy available for determination of petitioners’ claims that their federal rights have been infringed.” In such a case, the CHIEF JUSTICE declared that they might apply for a federal writ of habeas corpus to secure protection of their rights. He vacated the judgments below and remanded to the Illinois Supreme Court for determination whether Illinois law provided an appropriate procedure for reviewing their claims.

Mr. Justice MINTON dissented on the ground that the Illinois Supreme Court based its judgment and opinion upon an adequate state ground.

Mr. Justice FRANKFURTER wrote an opinion dissenting on the ground that the writ of certiorari should have been dismissed for want of a properly presented federal question.

The cases were argued by Nathaniel L. Nathanson for the petitioners, Calvin P. Sawyer for Jennings, and by William C. Wines for the State of Illinois.

CRIMINAL LAW

Federal Courts Should Not Enjoin Use of Evidence in State Courts Even Though Allegedly Obtained by Illegal Search and Seizure

■ *Stefanelli v. Minard*, 342 U.S. 117, 96 L. ed. Adv. Ops. 99, 72 S. Ct. 118, 20 U.S. Law Week 4035. (No. 2, decided December 3, 1951.)

In this case, Stefanelli and three others sought to use the Civil Rights

Act, R. S. § 1979, 8 U.S.C. § 43, as the basis for an injunction to prevent the use in evidence against them in a New Jersey court of articles seized illegally by state officers. Police had entered petitioners’ homes without legal authority and there seized property useful in bookmaking, a misdemeanor under New Jersey law. A federal district court refused to issue an injunction to prevent use of the evidence in the state court on the ground that petitioners had not exhausted their remedies under state law. The court of appeals affirmed. In the Supreme Court, petitioners relied upon language in the opinion in *Wolf v. Colorado*, 338 U.S. 25 (see 36 A.B.A.J. 129).

The Supreme Court affirmed in an opinion by Mr. Justice FRANKFURTER which held that “the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure”. The opinion cited the maxim that equity will not enjoin a criminal prosecution and declared that the “lode-star” of interpretation of the Civil Rights Act was that it “should be construed so as to respect the proper balance between the States and the federal government in law enforcement”. The opinion stated that no irreparable injury to petitioners’ rights was threatened that would call for an exceptional use of the equity powers of the federal courts. “If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue.”

Mr. Justice BLACK and Mr. Justice CLARK concurred in the result.

Mr. Justice MINTON took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS wrote a short dissenting opinion in which he ex-

pressed his adherence to the dissenting views of Mr. Justice Murphy and Mr. Justice Rutledge in the *Wolf* case.

The case was argued by Mordecai Michael Merker for petitioners, and by Charles Handler for respondents.

CRIMINAL LAW

State Judgment of Conviction Upheld Over Contention That It Rested upon Confession Obtained During Illegal Detention of Prisoner

■ *Gallegos v. Nebraska*, 342 U.S. 55, 96 L. ed. Adv. Ops. 82, 72 S. Ct. 141, 20 U.S. Law Week 4025. (No. 94, decided November 26, 1951.)

Gallegos, a Mexican farm hand who could neither speak nor write English, was arrested for vagrancy in Texas on September 19, 1949. He was subjected to questioning in an attempt to establish his identity, but there was no suspicion that he had committed a serious crime. After several days of interrogation, he disclosed the fact that he had killed his paramour in Nebraska. On September 27, a Nebraska sheriff took him to that state where he repeated his story. On October 13, he was brought before a county judge for a preliminary hearing on a complaint charging him with manslaughter. This was the first time he had been brought before any magistrate or court, either in Texas or Nebraska. No charges had been filed against him in either state prior to that date. At the trial, the two confessions were admitted in evidence against him. He was convicted and the conviction was affirmed by the Supreme Court of Nebraska over arguments that the confessions and plea of guilty were inadmissible because they were the result of "physical torture and threats of torture, mental duress, illegal transportation and illegal detention" in violation of state and federal constitutions. The Supreme Court of the United States affirmed the conviction on a writ of certiorari which presented only the following question: "Are confessions and a plea obtained from a prisoner during a period of twenty-five days illegal de-

tention by federal and state officers before being brought before a magistrate and before counsel is appointed to assist the prisoner admissible in evidence?"

Mr. Justice REED announced the judgment of the Court and an opinion in which the CHIEF JUSTICE, Mr. Justice BURTON and Mr. Justice CLARK joined. Declaring that a "criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights", he held that deference should be given to the conclusions of the state courts on disputed facts and essential issues of what happened. "Its duty compels this Court, however, to decide for itself, on the facts that are undisputed, the constitutional validity of a judgment that denies claimed constitutional rights". Considering only the uncontroverted facts, Mr. Justice REED found no violation of the Fourteenth Amendment in Gallegos' conviction. Noting that the *McNabb* doctrine, which excludes all evidence obtained as a result of illegal detention of a prisoner, is but a federal rule of evidence, applicable in the federal courts, and not an exhortation of the Fourteenth Amendment, he refused to apply that doctrine in this case.

Mr. Justice MINTON took no part in the consideration or decision of the case.

Mr. Justice JACKSON, joined by Mr. Justice FRANKFURTER, wrote a concurring opinion holding that defendant's trial was "scrupulously fair and dispassionate". He saw the case as presenting only the issue whether the *McNabb* doctrine should be converted into a constitutional limitation upon the states and explained his reasons for concurring with Mr. Justice REED that that should not be done.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, wrote a dissenting opinion, in which he declared that he believed that the Constitution forbids "the use of confessions obtained by the kind of secret inquisi-

tion" present in this case.

The case was argued by Robert G. Simmons, Jr., for Gallegos, and by Homer L. Kyle and Walter E. Nolte for respondent.

MARRIAGE

Vermont Judgment Nullifying Marriage Because of Allegedly Invalid Florida Divorce Reversed for Failure To Prove Fraud upon Florida Court

■ *Cook v. Cook*, 342 U.S. 126, 96 L. ed. Adv. Ops. 94, 72 S. Ct. 157, 20 U.S. Law Week 4033. (No. 30, decided December 3, 1951.)

Petitioner Florence Cook married respondent Arthur Cook in Virginia in February, 1943. Shortly thereafter, Arthur discovered that petitioner was the wife of one Mann. Petitioner then went to Florida and was granted a decree of divorce by a court of that state. She and Arthur remarried in December, 1943. Florence later secured in Hawaii a decree of separation and maintenance, whereupon Arthur brought this action in Vermont to have the marriages declared null and void. Upon trial, the Vermont court granted a judgment of annulment, finding that Florence had secured her Florida decree by deceiving the Florida court about her intention to make that state her domicile. The petition of annulment was dismissed as to the second marriage. The Supreme Court of Vermont affirmed the judgment as to the first marriage and reversed as to the second, holding it also to be null and void.

Speaking through Mr. Justice DOUGLAS, the Supreme Court of the United States reversed, holding that respondent had not carried the burden of undermining the Florida decree by showing that the issue of domicile had not been contested in the Florida proceedings. If Mann, the first husband, was personally served or appeared in the divorce proceedings, it was stated, Vermont could not reopen the question of domicile. "... until Florida's jurisdiction is shown to be vulnerable,

Vermont may not relitigate the issue of domicile upon which the Florida decree rests", Mr. Justice DOUGLAS declared.

Mr. Justice BURTON concurred in the result.

A dissenting opinion by Mr. Jus-

tice FRANKFURTER found in the language of the Vermont Supreme Court a holding that the Florida proceeding was "neither consented to nor contested by Mann" and disagreed with the majority's ruling that the Vermont court did not give adequate

consideration to the question of the effect of Mann's contesting the Florida domiciliary issue.

The case was argued by Henry Lincoln Johnson, Jr., for petitioner, and by Everett L. Hathorn for respondent.

Courts, Departments and Agencies

George Rossman • EDITOR-IN-CHARGE

Maxine M. Sprung • ASSISTANT

Administrative Law . . . Selective Training and Service Act . . . conscientious objector's appeal requesting classification as minister of gospel did not constitute abandonment of right to be classified as conscientious objector . . . board of appeal must review question of proper classification de novo.

■ *Cox v. Lt. Gen. Wedemeyer, Commanding Officer of the Sixth Army*, C.A. 9th, November 21, 1951, Pope, C.J.

A petition for a writ of habeas corpus alleging that appellant was unlawfully imprisoned for desertion in time of war was dismissed by the District Court but on appeal the order was reversed. On his local draft board's selective service questionnaire appellant had disclosed that he was a conscientious objector and was classified as such. However, he appealed from this classification and asked the board of appeal to classify him as a minister of the gospel. In the letter by which the appeal was taken no mention was made of any conscientious objection to service. The board of appeal held him not to be a minister and did not consider whether he was a conscientious objector because "the registrant does not appeal as a conscientious objector but only because he claims to be a minister of religion".

Appellant testified that he did not take the induction oath and when he received his first pay check he left camp and returned home where he resided until imprisoned for desertion.

The District Court held that appellant had "impliedly, if not expressly, abandoned his claim to be classified as a conscientious objector" when he limited his appeal to the claim that he was a minister. However, the Court of Appeals ruled that the right to be classified as a conscientious objector had not been abandoned since the appeal had placed the question of the proper classification in its entirety before the board of appeal under §5 (g) of the Selective Training and Service Act of 1940, 50 USC 305 (g) and §§627.25 and 627.26 (a) of the Selective Service Regulations. These required a review *de novo*. Section 627.25 provides that if an appeal involves the question of whether a registrant is a conscientious objector the appeal board, after determining that he does not belong in a class calling for deferment, "shall transmit the entire file to the United States district attorney . . . for the purpose of securing an advisory recommendation of the Department of Justice . . ." and §627.26(a) requires the board of appeal to classify the registrant "giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant", determining item by item whether the registrant be-

longs in any of the classes provided for by the regulations. Among the classes to be thus considered is Class IV-E for those registrants found to be conscientious objectors. The Court concluded that appellant never had a hearing before the board of appeal upon the question of his right to a IV-E classification.

In addition, the Court found that none of the appellant's subsequent acts following his induction operated by way of waiver or consent to subject him to the jurisdiction of the Army. He had worn the army uniform but refused to carry a rifle and had continually asserted his refusal to serve as a soldier.

Arbitration . . . Federal Arbitration Act . . . collective bargaining agreements providing for arbitration of disputes excepted from coverage of Arbitration Act under §1 excluding "contracts of employment" . . . federal district court without jurisdiction to enforce such agreements.

■ *Amalgamated Assn. of Street, Electric RR and Motor Coach Employees of America, Local Div. 1210 v. Pa. Greyhound Lines, Inc.*, C.A. 3d, November 6, 1951, 192 F. 2d 310, Hastie, C.J.

The question confronting the Court in this case was whether a collective bargaining agreement providing for arbitration of disputes arising thereunder could be enforced by a federal court under §4 of the Arbitration Act, 9 USC, 61 Stat. 669, which states that a party aggrieved by another's failure to arbitrate under a written agreement calling for

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

arbitration can petition a district court to compel arbitration. At issue was the construction of language appearing in §1, which, as originally enacted in 1925, defined "maritime transactions" and "commerce" and then stated that "Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Question arose as to whether the phrase "nothing herein contained" meant "nothing in this statute" or "nothing in this section" and the Courts of Appeals divided on the construction. Congress, in 1947, amended the section by adding a catchline stating: "§1. 'Maritime transactions' and 'commerce' defined; exceptions to operation of title." (emphasis supplied) leading the Court to conclude that Congress had intended to except from the Act's coverage arbitration of disputes arising out of a "contract of employment".

Remaining for consideration, however, was the question of whether "contracts of employment . . . of workers engaged in . . . interstate commerce" included collective bargaining agreements. Appellant, the union, emphasized the word "employment" contending that the processes of hiring and firing are the essence of employment, while a collective bargaining agreement constitutes "merely the framework within which employment is effectuated". However, the Court was of the opinion that such an interpretation would apply to the phrase "contracts of hire", while "'contracts of employment' is not a term of art". The Court saw no compelling reason to give the phrase a narrower construction than its normally comprehensive significance. In addition, the Court found that the history of the Act supports such an interpretation since it was enacted during a period of widespread dissatisfaction with the federal courts' interference in labor disputes and increasing reliance upon administrative machinery for the settlement of labor disputes. The Court concluded that "For Con-

gress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining . . . would have created pointless friction in an already sensitive area as well as wasteful duplication."

Bankruptcy . . . preferential transfers . . . trust receipts . . . recorded trust receipts held not secret liens and enforceable in bankruptcy proceedings under amendment to §60a of Bankruptcy Act . . . amendment applicable to case adjudicated before its effective date which was pending on appeal.

■ *Coin Machine Acceptance Corp. v. O'Donnell, Trustee in Bankruptcy for Harvey Distributing Co., Inc., Bankrupt*, C.A. 4th, November 5, 1951, Parker, C.J.

This case involved the right to the proceeds of sale of certain machines covered by trust receipts. Appellant, who had paid the manufacturer of the machines which were delivered to a bankrupt local dealer, was secured for the purchase price advanced by recorded trust receipts. The District Court agreed with the trustee in bankruptcy's contention that the trust receipts were void as preferential transfers within the meaning of §60a of the Bankruptcy Act, as amended by the Chandler Act of 1938, 11 USC 96(a), but on appeal the District Court's order was reversed. The trustee had argued that the trust receipts were void because the bankrupt was given power to sell the machines to buyers in the ordinary course of trade who would take them free of appellant's security interest. Section 60a should be interpreted to mean, the trustee contended, that "the transfer of security evidenced by the trust receipt must be deemed to have been made immediately before bankruptcy when bankrupt was insolvent and hence be deemed a preferential transfer".

However, the Court refused to attribute to Congress an intention to make trust receipts, which are the standard method of dealer financing in the automobile and domestic ap-

pliance industries, unenforceable in bankruptcy proceedings as being secret liens. Further support for this position was found by the Court in the amendment to §60a enacted by Public Law 461, 81st Cong. c. 70, 2d Sess. The new section, in brief, permits the enforcement of liens, required by applicable law to be perfected by recording, if they are recorded within twenty-one days or within the local statutory period. In this case the Court noted that the trust receipts were promptly recorded "long in advance" of the bankrupt's insolvency.

Moreover, it was argued that the new amendment was not applicable to the present proceedings because the bankruptcy adjudication occurred before the amendment's effective date. However, the Court pointed out that the amendment specifically states that it shall "govern proceedings so far as practicable and applicable in cases pending when it takes effect" and the suit to enforce the trust receipts lien was pending on appeal on the amendment's effective date. Furthermore, stress was placed on the facts that the proceeds of the sale were still in the court's custody and appellant's claim had been promptly asserted. Under the bankruptcy power, the Court stated, Congress can alter the rights of general creditors even after adjudication so long as what is done is not so arbitrary as to be "incompatible with fundamental law".

Labor Law . . . National Labor Relations Act . . . National Labor Relations Board orders prohibiting a union and newspaper publishing company from discriminating against nonunion workers enforced.

■ *National Labor Relations Board v. Newspaper and Mail Deliverers' Union of N. Y. and Vicinity, and the Hearst Consolidated Publications*, C.A. 2d, November 30, 1951, Frank, C.J.

A decree enforcing National Labor Relations Board orders prohibiting a deliverers' union and major newspaper publishing company from engaging in discriminatory hiring

practices was entered by the Court in this case. The Board had petitioned the Court for enforcement of the cease-and-desist orders "including remedial provisions for back pay to injured applicants".

Judge Frank, writing for the Court, noted that in the "*Journal-American Case*" the union had been found guilty of violating §8(b)(2) and (1) (A) of the Act by attempting to cause the Hearst Publications illegally to prefer union men in assigning work to job applicants. The Board's order was attacked on the grounds that there was insufficient evidence to support the order and that an order calling for back pay was improper when "there is evidence of only sporadic violations of the Act with no day-to-day record of the existence and extent of the preferences". However, the Court replied that there was sufficient evidence to support the order and further, at this point specific back-pay awards were not being considered. The proper time for the union to challenge the amount of the awards would be when they are made to particular individuals, Judge Frank stated, and in the meantime the order could "call generally for restitution". Judge Frank added that the Board could impose joint and several liability on the union and publisher when both were found to have engaged in the discriminatory practices in accordance with the holding in *Union Starch and Refining Company*, 186 F. (2d) 1008. As for the argument that the publisher was not guilty of violating the Act since the union coerced it by threats of strikes, Judge Frank answered that "Economic coercion is no excuse for violating the Act."

It was further found that although there was similar evidence of discrimination in the "*Herald Tribune Case*" the Board had settled with the *Tribune* management out of court and therefore no finding of discrimination was made or court order entered. The union argued that the Board could not find it guilty of discrimination unless it found the *Tribune* also guilty, but the Court said

that it was within the Board's discretion to make a settlement with one of the "joint offenders".

Labor Law . . . Christmas bonus held wages . . . employer's regular yearly Christmas bonus to employees held part of wages, not gift, subject to collective bargaining.

■ *In re Miles-Bement-Pond Co. and Local No. 405, United Auto, Aircraft & Agricultural Implement Workers, C.I.O.*, Case No. 1-CA-841, NLRB, December 5, 1951.

The issue in this case was whether a Christmas bonus regularly paid by an employer for twelve years was a gift or whether it constituted part of the employees' wages, and as such was subject to collective bargaining. The bonus paid the employees had consisted of one week's pay or a percentage of yearly earnings until December, 1950, when the company announced that because of its newly instituted retirement plan the employees would receive one dollar for each year of service, or a minimum of five dollars.

The National Labor Relations Board, by a three-to-one ruling, held that although it may "believe in the Christmas spirit" the regular year-end bonus payments had "become part of the employees' wage expectancy" and as such "constituted an integral part of the Respondent's wage structure". Thus, although the bonus "may be paid at Christmas and therefore carry with it the Christmas spirit of gift giving" it constituted compensation upon which the employer, at the union's request, must bargain or else be held guilty of violating §8(a)(5) and (a)(1) of the National Labor Relations Act. However, the majority opinion noted that "Of course an employer is free to make a genuine Christmas gift to his employees."

Board Member Murdock dissented, holding that "A genuine Christmas gift has no place on the bargaining table." He said that "for this Board to take the position that an employer cannot make a Christmas gift to his employees without first bargaining about it with their

representative, is to reach a result destructive of the Christmas spirit and not necessary to the practice and procedure of collective bargaining . . . Particularly at the Christmas season men are moved to make gifts . . . Even grudging, callous characters have been transformed and moved to participate in the giving of this season. (See Dickens, Christmas Carol, Mr. Scrooge)".

Torts . . . right of privacy . . . magazine's use of plaintiff's picture as illustration for article on pedestrian carelessness invaded her right of privacy . . . publication not privileged as news reporting.

■ *Leverson v. Curtis Publishing Co.*, C.A. 3d, December 12, 1951, Goodrich, C.J.

Plaintiff, when a 10-year-old child, was involved in a street accident in which an automobile nearly ran over her. A photographer took her picture as she was being lifted to her feet by a bystander and the following day the photograph appeared in a local newspaper. Twenty months later defendant used the photograph as an illustration for an article titled "They Ask To Be Killed", dealing with pedestrian carelessness. Plaintiff claimed that this publication of her picture violated her right of privacy and in the trial court the jury awarded her a judgment of \$5,000.

On appeal the Court affirmed, noting that its decision was rendered "without the benefit of an authoritative decision on the exact point involved. . . ." However, Judge Goodrich remarked that the scope of the question in the case was materially narrowed by defendant's concession that there was such a thing as a legally recognized right of privacy, and by plaintiff's concession that her right was not invaded by the newspaper publication the day following the accident. Remaining for consideration were two questions. These the Court stated as follows: " (1) Is the privilege involved in the original publication lost by the lapse of time between the date of the original publication immediately follow-

ing the accident and the reappearance of the plaintiff's picture in the *Saturday Evening Post* twenty months later? (2) . . . if the privilege has not been lost by lapse of time, is it lost by the using of the plaintiff's picture, not in connection with a news story, but as an illustration heading an article on pedestrian traffic accidents?" On the first point the Court decided that the immunity from liability for publication was not lost through lapse of time since plaintiff "continued to be newsworthy with regard to that particular accident for an indefinite time afterward". But with respect to the second point, Judge Goodrich decided that although the first publication of plaintiff's picture was purely news, the second publication "was a sort of dramatic setting for the discussion of a traffic problem". This change in the purpose of the publication lost the privilege, Judge Goodrich ruled, and constituted an actionable invasion of plaintiff's right of privacy. Plaintiff was "newsworthy" with regard to her traffic accident, the opinion noted, but defendant's use of her picture did not relate to her accident; it related to the general subject of traffic accidents and pedestrian carelessness. In addition, the motorist, not plaintiff, was careless at the time of the accident. In the Court's opinion, "The sum total of all this is that this particular plaintiff, the legitimate subject for publicity for one particular accident, now becomes a pictorial, frightful example of pedestrian carelessness. This, we think, exceeds the bounds of privilege."

Torts . . . infant injured while in mother's womb has legal right when later born to recover damages for injuries sustained.

■ *Woods v. Lancet*, N. Y. Ct. of Appeals, December 6, 1951, Desmond, J.

Reversing its ruling in *Drobner v. Peters*, 232 N.Y. 220, the New York Court of Appeals ruled that an unborn viable child who was injured during its mother's pregnancy as a result of another's negligence, could

sue for damages after it was born. The lower courts, basing their decision on the holding in the *Drobner* case, had dismissed the complaint for failure to state a cause of action.

Desmond, J., writing for the majority, said that the "precise question" in the action was whether the Court should follow the *Drobner* precedent, "or shall we bring the common law of this state, on this question, into accord with justice?" Answering his own question, Judge Desmond stated: "I think, as New York State's court of last resort, we should make the law conform to right." Noting that both the *Drobner* and instant cases involved the sufficiency of a complaint alleging prenatal injuries, tortiously inflicted on a nine-month fetus, viable at the time and actually born later, the Court said that "The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced." It examined the case in the light of the changing history of legal thought in the thirty years since the *Drobner* decision was rendered and found that since 1921 numerous affirmative precedents allowing recovery developed. Judge Desmond further remarked that "[n]egligence law is common law" and common law can be molded and changed to meet the times.

The opinion also disposed of two other arguments made against permitting recovery. First, the Court denied that the difficulty of proving that the unborn child was injured or that the injuries produced postnatal defects destroyed the legal right of recovery. The question of causation is similar to those arising in many other negligence cases, the Court noted, and furthermore, it said that such questions are beside the point in determining the sufficiency of pleading. Second, the Court rejected the "purely theoretical" argument that an unborn child "has no existence of its own separate from that of its mother". "This child, when injured," the Court stated, "was in fact, alive and capable of being delivered and of remaining alive, sep-

arate from its mother."

Lewis, J., in a dissenting opinion concurred in by Conway, J., said that while he agreed that prenatal injuries to a child "should not go unrequited by the one at fault", the legislature and not the courts should make the ruling. He said that the right of a child "to enforce such requital by an action at law" should not be created by a judicial decision on the facts in a single case but should be the product of legislative action. To this argument Judge Desmond had replied that "Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule."

Trusts . . . "prudent man rule" . . . under Oklahoma statute otherwise unrestricted trustees operating under "prudent man rule" may invest trust funds in stocks and obligations of corporations and in shares of investment trust companies.

■ *In re Estate of Flynn; First National Bank & Trust Co. of Okla. City and S. B. Flynn, Jr. v. O. F. Flynn and S. B. Flynn*, Okla. Supreme Ct., November 13, 1951, 237 P. 2d 903, Arnold, Ch. J.

This was an action by trustees seeking an order authorizing their corporate cotrustee to invest certain trust funds they held in corporate stocks and other securities. The broadly defined terms of the trust were "To hold, invest, re-invest, and collect the income . . ." but under the applicable statute in effect when the trust was created, trust investments were limited to loans secured by real estate or other sufficient collateral security, government bonds, municipal bonds, state, county, and school district bonds and shares in building and loan associations. However, in 1949 the Oklahoma legislature enacted 60 O.S. 1949 Supplement §161, under which trustees, unless otherwise restricted, could invest in any form of property "in which an individual may invest his own funds" so long as he adhered to

the following standard: "In making investments, the trustee shall exercise the judgment and care in the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety to their capital."

The trial court found that, in accordance with the statutory standard, prudent men at the present time are investing in stocks and obligations of corporations and in shares of investment trust companies and on appeal the Court affirmed, holding that the evidence amply sustained the trial court's order authorizing the trustees to invest the securities mentioned. The Court said that the legislature has the constitutional power to broaden the field of investments by trustees even though "the powers of otherwise unrestricted trustees are extended thereby to investments whereby control of the trust funds is lost to the trustee".

Vendor and Purchaser . . . specific performance . . . subvendee of less than whole amount of real estate can obtain specific performance from original vendor if proof at trial evidences that equities so warrant.

■ *Geo. V. Clark Co., Inc. et al. v. N.Y., N. Haven and Hartford RR. Co.*, N.Y. Sup. Ct., App. Div., 1st Dept., October 30, 1951, 107 N. Y. S. 2d 721, Callahan, J.

The issue presented in this action was the sufficiency of a complaint re-

questing specific performance of a contract for the sale of real estate. Plaintiff was the subvendee of less than the whole amount of the realty and the lower court dismissed the complaint on the ground of lack of privity of contract between vendor and plaintiff. On appeal the order was reversed, the Court holding that privity of estate existed and equities may have arisen that will give the subvendee the right to obtain specific performance of the contract of the vendee for transfer of the whole property and the subvendee's own contract of subpurchase. Callahan, J., said that the complaint on its face stated a good cause of action for equitable relief and "Whether the equities warrant such relief will depend on the proof to be developed on trial". Of course, the Court was careful to point out that no conveyance would be compelled to the original vendor's prejudice or unless it received either from the vendee or subvendee the consideration contracted to be paid.

In support of its position the Court cited *Epstein v. Gluckin*, 233 N.Y. 490, for the proposition that if plaintiff was the assignee of the entire contract he could undoubtedly obtain specific performance, and an Illinois case, *Miedema v. Wormhoudt*, 288 Ill. 537, which on this precise question held that a subvendee of less than the whole property could obtain specific performance. The Court stated: "We deem that the better rule would permit the subvendee to address its complaint to the court *for trial*, so that inquiry may be made into all the surround-

ing facts and circumstances in order to determine whether equity should enter a decree that will in every respect protect all parties. . . . The supplicant for relief should not be turned away merely because his complaint shows lack of privity of contract or because of any similar legalistic obstacle."

Van Voorhis, J. dissented because he believed that the primary contract between the vendor and original purchaser, which called for the purchase of ten buildings, covered so much more than the subvendee's contract, which involved the purchase of only one building, that "on the face of the pleading Clark should not be granted specific performance".

Further Proceedings in Cases Reported in This Division

■ The following action has been taken in the United States Supreme Court:

AFFIRMED, December 11, 1951: *The Lorain Journal Co. et al. v. U. S.—Monopolies* (36 A.B.A.J. 936, November, 1950; 37 A.B.A.J. 467, June, 1951).

PROBABLE JURISDICTION NOTED, December 11, 1951: *In re Zorach et al. v. Clauson, Jr. et al.—Constitutional Law* (37 A.B.A.J. 770; October, 1951).

CERTIORARI DENIED, December 3, 1951: *Hammelt and Field v. U.S.—Contempt* (37 A.B.A.J. 67; January, 1951).

CERTIORARI DENIED, December 11, 1951: *U. S. v. Osage Nation of Indians—Indians* (37 A. B. A. J. 533; July, 1951).

Nominating Petition

Georgia

■ The undersigned hereby nominate E. Smythe Gambrell, of Atlanta, to fill the vacancy in the office of State Delegate for and from the State of Georgia and for a three-year term beginning at the adjournment of the 1952 Annual Meeting:

Wingate Dykes, of Americus;

Howell C. Erwin, Jr., of Athens;

F. M. Bird, John H. Boman, Jr., James W. Dorsey, A. C. Latimer, Dan MacDougald, Devereaux F. McClatchey, B. D. Murphy, Rembert Marshall, Moreton M. Rolleston, Jr., William B. Spann, Jr., Robert B. Troutman and Robert S. Wiggins, of Atlanta;

Charles L. Gowen and Bernard N. Nightingale, of Brunswick;

Frank D. Foley and A. Edward Smith, of Columbus;

Emory F. Robinson, of Gainesville;

Lewis R. Morgan, of LaGrange;

John B. Harris, of Macon;

Dudley B. Magruder, Jr., of Rome;

Alexander A. Lawrence and

George W. Williams, of Savannah;

Larry E. Pedrick, of Waycross.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ In attempting to assess the contribution to efficiency in government made by the Legislative Reorganization Act of 1946, its effect on the operations of legislative committees is of great significance. The following statement, prepared at the request of the Editor-in-Charge by Dr. Marcy, a member of the professional staff of the Senate Committee on Foreign Relations, throws light on the problem as it relates to the work of one of the most important committees of Congress.

The Staff of the Senate Foreign Relations Committee and Its Work— A Case Study of the Legislation Reorganization Act

By Carl Marcy, Staff Associate

■ Former Senator Elbert Thomas of Utah wrote in 1942 that "Committees [of the United States Senate] are not provided for in our Constitution. They are a matter of convenience in expediting the Senate's business. They should contribute to Senate efficiency by developing experts and dividing work."¹

Prior to the Legislative Reorganization Act of 1946,² committees of the Congress had few experts. They operated with small clerical staffs which concentrated on handling committee mail, keeping committee calendars up-to-date, maintaining the files and regulating the flow of papers. Such "expertness" as most committees had was to be found in the ability of the individual members, many of whom served on several committees, and in the personnel of the executive departments always ready to supply the information they thought necessary to help the committees with their legislative responsibilities. A few committees made use of experts detailed to them from the executive departments. Others had their reports written in the executive departments or by interested special groups.

Section 202(a) of the Legislative Reorganization Act provides that "each standing committee of the Senate and the House of Representatives . . . is authorized to appoint by a majority vote of the committee not more than four professional staff members in addition to the clerical

staffs on a permanent basis without regard to political affiliations and solely on the basis of fitness to perform the duties of the office. . . . Professional staff members shall not engage in any other work than committee business and no other duties may be assigned to them. . . ."

It was the intent of Congress in adopting the Reorganization Act "to reconvert our inherited and outmoded congressional machinery to the needs of the day".³ The Act was designed to streamline the legislative machinery. It reduced the number of standing committees in the Senate from thirty-three to fifteen; it reduced the size of the committees; it identified the committees' jurisdiction; it raised the salaries of members of Congress; and dealt with a number of other matters.

The purpose of this article is to present a brief case history of the way in which the Reorganization Act has affected one committee, the Senate Committee on Foreign Relations, with particular emphasis on the professional services now available to the committee.

The Reorganization Act came into effect when the Republican-controlled 80th Congress was organized. In the case of the Foreign Relations Committee, Senator Arthur H. Vandenberg, as Chairman, was in a key position to determine the nature of the committee staff. In truly bipartisan fashion, he asked Dr. Francis O. Wilcox, the man who had been de-

tailed by the Library of Congress to assist the previous chairman, Senator Tom Connally, to assume the position of Chief of Staff. Dr. Francis O. Wilcox has given this description of his selection:

. . . at the outset when the Reorganization Act became operative and Senator Vandenberg took over the chairmanship, he asked me [at the suggestion of Senator Connally] if I would assume the job as Chief of Staff, and I agreed to do it. He then instructed me to find the best people that I could find with no limitations. He said that there was an important job to do and that I should secure the ablest people that could be found in a professional capacity to do that job. That is what I did. I did not ask people their political affiliations. I sought the recommendations of people in the Department of State and in our best universities . . . and in other areas, with the objective of finding the people who were available and best qualified to do this type of work.⁴

The nonpolitical staff nominated by Dr. Wilcox and confirmed by the committee has continued substantially the same although the 81st and 82d Congresses were controlled by the Democrats.

At the present time the group consists of three top professional members, including Dr. Wilcox, and eight carefully chosen assistants. All the professional members have had wide experience in government including the field of foreign affairs. Moreover, all members of the professional staff have had advanced study in international relations and have at one time or another taught in those fields. The clerical staff also has a substantial background in international affairs gained through graduate study and governmental experience.

The question is invariably asked, What does the committee staff do? In broad, general terms the committee staff does everything it possibly can to enable members of the Com-

1. Foreword to "The Senate Foreign Relations Committee" by Eleanor E. Dennison, Stanford University Press, page ix.

2. Public Law 601, 79th Congress, 2d Session.

3. Senate Report No. 1400, 79th Congress, 2d Session, page 2.

4. See Hearings Before the Committee on Expenditures in the Executive Departments, United States Senate, June 6 and following, 1951, page 68.

mittee on Foreign Relations to discharge their committee responsibilities in the most efficient, effective and responsible way possible.

This is no small job. In recent years the Committee on Foreign Relations has carried one of the heaviest burdens of all the committees of the Senate. During the 81st Congress, for example, the Committee met 175 times as a full committee. This figure does not include the times that subcommittees met. It considered more than 1000 nominations. It held hearings on such vitally important matters as the North Atlantic Treaty, the European Recovery Program, the Mutual Defense Assistance Program and revision of the United Nations Participation Act, among many others.

During the present session of Congress, the Committee in considering the Mutual Security Act of 1951 was concerned with legislation providing military, economic and technical assistance to all parts of the world. The sums of money involved were greater than the totals being spent for the Atomic Energy Commission and some seven government departments.

In assisting committee members to carry on their responsibilities, the work of staff members is most varied. Some of the types of work are the following:

Research. During the course of the year, the staff develops a wide variety of research projects. For example, in preparing for hearings, it is essential that committee members have background information on the type of question that should be asked particular witnesses. Staff members spend a considerable amount of time in gathering information that serves as the basis of questions asked at hearings. Questions to be effective must be backed by facts. The staff seeks to supply the facts.

Drafting Legislation. Once hearings have been completed, the Committee normally retires to executive or secret session, during which time the bill is drafted or amended and the report is prepared. At this stage of consideration, the staff, usually

with the assistance of the Office of the Legislative Counsel of the Senate, and possibly staff members from the Executive Branch, must prepare amendments for consideration of the members of the Committee, and draft language for inclusion in the report.

Drafting Reports. When hearings on legislation or treaties have been concluded, and the Committee has formulated its final conclusions, it is necessary for the staff to prepare the report of the Foreign Relations Committee to the full Senate. This report serves as a guide for the floor debate which then takes place on the measure. The report must incorporate the important information developed during the hearings as well as additional information that may be helpful to the Senate in its consideration of the legislation. Many times the information for these reports is developed by the staff by itself. On other occasions the staff must rely in part on information supplied by the executive departments, but carefully checked by the staff. Frequent use is made of the facilities of the Library of Congress in obtaining material for use in the report. And there are many occasions, of course, when the Committee receives information from sources outside the Government which may be helpful to it.

The preparation of these reports is no small task. The information used must be reliable, succinct, and useful. It must frequently be prepared on short notice and entails detailed and intensive work on the part of the staff.

Assisting on the Floor. When a measure reaches the Senate floor, committee members frequently find that additional information may be needed to help meet the arguments of opponents of the legislation. The staff is available to assist in providing these data. The Chairman of the Committee has responsibility for defending the legislation reported by the Committee. As new arguments are submitted in opposition to the Committee's legislation, or as questions are raised during debate, it is

frequently necessary for the staff to be hard at work off the floor getting information for the use of the Chairman and other committee members.

Consultation. During the last Congress, the Chairman of the Committee on Foreign Relations appointed a number of permanent consultative subcommittees. These subcommittees have area responsibilities which in general correspond to the organization of the Department of State. Thus, there is a subcommittee on United Nations Affairs, another on Western Europe, another on the Far East, and so on. The purpose of these subcommittees is to provide a focal point in the Committee to which responsible officers of the Department of State may report and with which they may consult.

A member of the committee staff is assigned to each subcommittee. He is expected to become something of an expert in this particular field of responsibility. On his own he may seek information from the Department of State. He acts as an adviser to the chairman of the subcommittee, recommending matters that he thinks should be discussed with the Department of State, advising as to matters that may become important for the Committee to know about, or possibly traveling abroad with the subcommittee when it finds such travel necessary in order to carry on its functions.

Miscellaneous Activities. Space does not permit further descriptions of the work of the staff. But it should be recorded here that the activities of the staff are as varied as the work of the committee members. The Foreign Relations Committee considers such matters as fisheries conventions, bills authorizing the construction of international bridges, legislation relative to military and economic assistance to foreign countries, genocide, conventions of friendship, commerce, and navigation, and conventions on double taxation. Lawyers know perhaps as well as any other professional group that one cannot simultaneously be a true expert on such matters as decedents' estates and income taxes, international law,

freedom of the press, loyalty, the Far East, military policy, and the breeding habits of fish in the high seas. Yet these are matters that have come before the Committee on Foreign Relations during the past two years. They have been dealt with by a professional staff of three, assisted by the other staff members.

The staff of the Foreign Relations Committee is smaller than that of many law firms of the United States. They can do little more, in the final analysis, than deal broadly with important foreign policy questions, and attempt to ferret out mistakes in less important matters.

The fact that, even with the help of the Reorganization Act, the staff assistance that congressional committees receive is so limited, makes it

particularly important that groups like the American Bar Association, or individual lawyers, be alert to subjects pending before congressional committees. They can on occasion direct attention to important matters which might otherwise escape the attention of members of Congress or of their staffs.

Democracy is a form of government that rests on the will of the people. The people's representatives in the Congress must get their guidance from the people and the people must ever be watchful that their representatives protect the national interest. It is the right, if not the duty, of every citizen to petition the Congress. In foreign policy matters, the right of petition can be exercised by appearances before the For-

eign Relations Committee of the Senate or by addressing communications to that Committee.

The staff of the Foreign Relations Committee during the two years that I have served with it has done its utmost to bring to members of the Committee expert, nonpolitical advice. The staff has no axe to grind. It does not seek to make decisions for the members or to influence them in their decisions. What it tries to do is to see that Senators on the Foreign Relations Committee have the information they need to enable them to consider all sides of controversial questions and to make intelligent decisions. The staff is interested in the facts, in making those facts available and then giving effect to the decisions of the Committee.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

When Do Legal Fees Accrue?

■ Accrual basis clients are faced with an important question in handling their deductible legal fees. Are the fees deductible (1) when finally billed, or (2) when the services are finally completed although no bill has yet been rendered, or (3) in each year services are rendered, although the case has not been completed and no bill has been rendered? While these events may fall into different taxable years, the client may find it preferable taxwise to take the deduction in one particular year rather than the others. The problem then is whether the lawyer can to any extent control the year in which his client can deduct the legal fees as an accrued expense.

Generally, an accrual basis taxpayer deducts expense items for which liability has been fixed and which are determinable as to

amount. It is the latter requirement which creates difficulties as to the correct year for accruing legal fees. During 1951, three different courts ruled on this issue and their decisions point up various practices which can be adopted by lawyers to help their clients in accruing and deducting legal fees.

The first case was *Canton Cotton Mills v. United States*, 94 F. Supp. 561, decided by the Court of Claims on January 9, 1951. The taxpayer retained attorneys in 1934 to handle its floor tax and processing tax matters. A \$500 fee was paid that year with an understanding that a fair fee would be paid for the entire services rendered. The United States Supreme Court held the processing tax invalid on January 6, 1936. (*United States v. William M. Butler et al.*, 297 U. S. 1). In February, 1936,

the taxpayer and its attorneys agreed on a \$15,000 payment covering services rendered in 1934, 1935 and 1936. Taxpayer tried to deduct the entire amount in 1936, but the Commissioner disallowed it. In the argument, the Government apparently conceded that some part of the \$15,000 accrued in 1936 but insisted that the part allocable to services performed in 1934 and 1935 was not deductible in 1936, presumably on the theory that it had accrued in the earlier years. The Court of Claims rejected this contention, holding that the entire \$15,000 fee accrued in 1936. It pointed out that there was no fee arrangement in the earlier years and that the mere performance of "some services" would not establish an accrual. Although there was a definite liability to the attorneys during 1934 and 1935, the amount could not be "estimated within reasonable limits" by the taxpayer, especially since the scope and extent of its matters depended on how the Supreme Court would decide the *Butler* case.

The second case, *Kanne v. American Factors, Limited*, 190 F. (2d) 155 (June 13, 1951), came before the Court of Appeals for the Ninth Circuit. The accrual basis taxpayer had

been engaged in nine years of litigation over the issue of whether its reorganization had been fraudulently accomplished. In 1932, its case finally ended with the United States Supreme Court's denial of certiorari. Part of the legal fee for its defense had been paid before that year and the balance of about \$88,000 was paid in 1932. The collector argued that the taxpayer should have determined the amount of services rendered by the attorneys before 1932 and taken deductions for those earlier years accordingly. In turning down this claim, the circuit court said: "This would require a businessman making up his tax return for a preceding year to ask attorneys conducting a partially litigated case to calculate the amount of their charges for that tax year. Business is not conducted in such a manner, nor can attorneys reasonably be required to make such calculations."

The latest case in the series, *Cold Metal Process Company*, 17 T. C. No. 110 (December 4, 1951), was decided by the Tax Court and seems to be at variance with the implications of the earlier decisions. One law firm performed services for the taxpayer over a number of years, with 50 per cent of the services rendered in 1945 and the other 50 per cent spread over years before 1945. Another law firm also performed services for the taxpayer over a period of several years ending in 1945. None of these services was rendered on a contingent fee basis. At taxpayer's request (the facts do not indicate when it was made), both firms submitted bills which were received about January 28 and February 28, 1946, before taxpayer's books had been closed or its income tax return filed for the year 1945. Each statement was dated December 28, 1945, and the taxpayer deducted the amounts as accruals in 1945. The Tax Court upheld the Commissioner's disallowance of the

accruals for 1945 because there was no evidence that they could have been estimated with reasonable certainty before the end of the year. It said: "No proof was made that an amount of compensation had been agreed upon, or that there was any arrangement between petitioner and its attorneys which would have enabled it to make a reasonably accurate estimate of the charge to be rendered." The fees were not accruals "before the bills were rendered in 1946". And to support its conclusion, the Tax Court cited both the *American Factors* and the *Canton Cotton Mills* cases.

Assuming that the legal services in the *Cold Metal Process Company* case had been completed in 1945, the Tax Court would seem to be in disagreement with certain implications which can be validly drawn from the wording of the *American Factors* decision. In the latter case, the Ninth Circuit assumed that a businessman making up his return for a "preceding" year wouldn't normally request a partial bill for litigation still being carried on. In other words, it accepted as a hypothesis that the ascertainment of amount would be made in the year following the taxable year, although in time for the return. It also accepted as a hypothesis that this ascertainment of the amount would be made, not by having the taxpayer make any computations, but merely by having him ask his attorney for the amount. From that point on, the Ninth Circuit felt that requesting a partial bill from an attorney for unfinished litigation was both unreasonable and not in the usual course of business. Therefore, the necessary reasonable estimate of amount could not have been made by the client.

The Tax Court's decision does not go into the question of whether the litigation or services had been completed in 1945. It stresses the client's inability to make an estimate on the

basis of his own information, without considering the possibility that he would simply ask his attorneys, a procedure which the Ninth Circuit apparently assumes to be normal and reasonable where the litigation has been completed. Likewise, the fact that the information is acquired in the following year but before the books for the taxable year have been closed and before a return is filed would apparently have no effect under the Ninth Circuit's view, assuming the litigation has been completed. This, too, seems contrary to the Tax Court's conclusions.

Despite the uncertainties created by the Tax Court case, lawyers can still do much to help their clients accrue legal fees to the best advantage. Where litigation or services continue beyond one taxable year, the client might be asked whether he can use a deduction for the year's services. If he can, the lawyer can render a partial bill, making certain that it is delivered before the end of the taxable year. If the client can not, no action is taken.

Where the services or litigation end during a taxable year, the better view would seem to be that the fees are accruals in that year. However, to make certain of this, the lawyer should see to it that his client receives a bill before the end of the taxable year.

If the client would prefer an accrual in the year following that in which the services are completed, the Tax Court's decision would apparently allow this to be accomplished by merely deferring billing until the following year. But, again, the better law would seem to make the fee automatically accruals in the year services are completed, on the theory that the client could reasonably check the fee with his lawyer, even though he actually does not do so until the following year. [Submitted by committee member Leon Gold.]

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

Notes of Current Interest

New Judges of the World Court

■ In accordance with the provisions of the Statute of the International Court of Justice, the terms of five of the present judges, one-third of the Court, expire on February 5, 1952. In addition, the death of Judge Azevedo, of Brazil, in May, 1951, created a sixth vacancy for the unexpired portion of his term, to be filled by special election. On December 6, 1951, elections to the six places were held by the U.N. Security Council and General Assembly in Paris. The two bodies, as called for by the statute, balloted independently on a list of candidates proposed by national groups in the States parties to the Statute.

To fill the vacancy caused by Judge Azevedo's death, the overwhelming choice in both the Council and the Assembly was another Brazilian, Levi Fernandes Carneiro. Judge Carneiro, 69, heretofore legal counselor to the Brazilian Foreign Ministry, will serve until 1955.

The seats to be filled at the regular election were those of Judges Fabela (Mexico), Hackworth (United States), Klaestad (Norway), Krylov (U.S.S.R.), and De Visscher (Belgium). Judges Fabela and Krylov, for reasons of health, were not candidates for re-election. Of the other three, Judge Hackworth, 68, former legal adviser to the Department of State, and Judge Klaestad, 66, were re-elected. For the remaining vacancies, new men were chosen: E. C. Armand Ugon, 58, President of the Supreme Court of Justice of Uruguay; Sergei A. Golunsky, 56, an official of the Soviet Foreign Ministry and former deputy chief prosecutor at the Tokyo war crimes trials; and Sir Benegal Rau, 64, former

judge of the High Court of Calcutta, member of the U.N. International Law Commission, and since 1949 India's permanent U.N. representative. All will serve until 1961.

In the complicated balloting which preceded the final result, Judge de Visscher, a pillar of the Permanent Court of International Justice and of the International Court of Justice since 1937, was unfortunately not re-elected. This outcome may be attributed in part to the desire of the electors for wide geographical representation on the Court; but, more regrettably, it may also be due in part to certain political maneuverings extending beyond the mere selection of judges. Yet even so the elections bring to the Court a group of jurists possessing diverse experience and substantial professional qualifications—both essential elements in the effective functioning of a world judicial body.

Recent Cases

Summaries are given herewith of three recent cases, two American and one British, which involve various points of international law that may be of general interest.

Aboitiz and Company v. Price, 99 Fed. Supp. 602 (District Court, Utah, June 16, 1951). The defendant Price, a national bank examiner temporarily on the staff of the United States High Commissioner for the Philippines, was interned by the Japanese in Manila along with other American civilians in January, 1942, and was not released until the retaking of the city by American and Filipino forces in February, 1945; the latter part of his internment being in the infamous Santo Tomas prison camp. In order to buy extra food

and bribe guards to admit it, Price desperately needed money. Through underground contacts he was able to meet an agent of the plaintiff banking house who arranged on a number of occasions for money to be smuggled in to Price in exchange for Price's personal notes promising to repay the amount on demand, without interest, either in Philippine currency or, at the lender's option, in United States dollars at the specified rate of two pesos to the dollar. The money supplied to Price and a fellow internee, amounting to 22,500 pesos in face value, was in the form of Japanese military occupation currency—the so-called "Mickey Mouse" money. Severe penalties would have been imposed on any participants in these transactions caught by the Japanese.

After the war the plaintiff sued Price, at his domicile in Utah, on the notes signed by him. On Price's behalf it was contended that the notes were void for illegality on one or the other of two grounds. First, it was said that the acts of the Japanese occupation authorities, as the government in *de facto* control of the Philippines, were valid under a general principle of international law; and since money transactions of this kind were strictly prohibited by the Japanese, the notes were illegal when made. Alternatively, it was argued that the Nuremberg and Tokyo war crimes trials had amply demonstrated the criminality of the war of aggression undertaken by Japan; and that if this entire Japanese undertaking was indeed so criminal, the Japanese occupation currency received by Price was tainted with the prevailing illegality and was an illegal consideration for the notes.

The Court (Ritter, District Judge) rejected these contentions and found for the plaintiff in an opinion which considered at length the relevant authorities and precedents. It determined that the Japanese were in belligerent military occupation of Manila at the essential times and in that capacity were entitled, under customary international law and the

Hague Regulations of 1907,¹ to take appropriate measures for the peace, order and good government of the Philippines. At least as far as an American court was concerned, however, the enemy occupant was not entitled to the additional right, sometimes mentioned by text writers, to take measures "for the realization of the legitimate purposes of his occupation", since the occupation was an act of aggression, an international crime, and could have no legitimate purposes.

From these principles the Court drew the conclusion that the issuance of occupation currency was a valid act, as a necessary aid to the general economic life of the community; and that the currency, as a thing of value at the time, was adequate consideration for the notes. On the other hand, it held that the prohibition of financial transactions by or with internees was invalid, on the grounds *inter alia* that it exceeded the powers of an occupant under the Hague Regulations and was part of a design to abuse prisoners in an internationally illegal manner;² and that further, in any case, it was a penal law not entitled to extraterritorial recognition. Hence the transactions were proper and were to be regarded as creating binding obligations.

Kahan v. Federation of Pakistan, [1951] 2 Times Law Reports 697 (England, Court of Appeal, 1951). Kahan brought suit in the British courts against the Federation of Pakistan and others for breach of a contract, made in England, to purchase certain Sherman tanks. In the contract it was expressly stipulated that the interpretation and effect of this agreement shall be construed and governed by English law, and for the purposes of proceedings this agreement shall be deemed to have been made in England and to have been performed there. The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English Courts.

The Government of Pakistan, entering a conditional appearance, sought to have the writ set aside insofar as it undertook to make the

Government a party, on the ground that the Government had not submitted to the jurisdiction of the British courts. The motion was granted below, and an appeal by the plaintiff was dismissed by the Court of Appeal (Jenkins and Birkett, Lords Justices).

Lord Justice Jenkins observed that there were two questions to be determined: first, the status of Pakistan as a sovereign State entitled in general to immunity from suit; second, if Pakistan was a sovereign State, whether it was answerable in the present proceedings. On the first point, a certificate was produced from the Secretary of State for Commonwealth Relations to the effect that since the Indian Independence Act of 1947 Pakistan was considered by the Government of the United Kingdom to be an independent sovereign state. There was some suggestion by counsel in the proceedings below that a distinction might be drawn between a member of the British Commonwealth, with rights stemming from an Act of Parliament and a foreign state in the strict sense; but this point was not taken up on appeal, and the status of Pakistan was assumed to be that shown by the Secretary's certificate.

On the second point the Court held that the contract contained an express and unambiguous agreement by Pakistan to submit to the jurisdiction. Nevertheless, an agreement *inter partes* to submit was not a submission:

A mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to renege from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the Court—will suffice.

In re Yee Yoke Ban's Estate, 107 N.Y.S. (2d) 221 (Surrogate's Court, New York County, July 3, 1951). The Consul General of the Republic of China in New York sought to have paid to him, for remittance to the beneficiaries in China, certain distributive shares of a decedent's estate. The request was based on the

most-favored-nation clause of a treaty between the United States and China; this was alleged to bring into operation other treaty provisions to the effect that³

a consular officer . . . may in behalf of his nonresident countrymen receipt for their distributive shares derived from estates in process of probate . . . provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.

In opposition to the Consul General's request, the Public Administrator contended that the shares could not reach the distributees, and that the Court should exercise its statutory power to withhold payment in such a case and direct the funds to be deposited in the city treasury. No evidence was submitted concerning the possibility of transmitting the funds to China.

The Court (Frankenthaler, Surrogate) observed that unlicensed payments to Chinese nationals had been prohibited by executive order of the President. It further took judicial notice of the fact that the Chinese mainland was held by the Communist Government, and that the authority of the (Nationalist) Republic of China extended only to the Island of Formosa. The Court accordingly held that, since the Consul General was unable to transmit the funds to the distributees, the shares in question should be paid into the city treasury.⁴

1. Regulations respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of October 18, 1907. 2. Malloy, *Treaties of the United States*, page 2281.

2. The effort by the Court to make this treatment out as a violation of the 1929 Geneva Convention on Prisoners of War (5 Hudson, *International Legislation*, page 20) seems unsuccessful, since the 1929 Convention applies only to members of armed forces and certain assimilated groups.

3. The treaties relied upon are not identified in the opinion of the Court. The most-favored-nation clause referred to may be that in Article 8 of the treaty with China of November 4, 1946, U. S. Treaties and Other International Acts Series No. 1871. The provision quoted appears to have been first employed in the treaty with Germany of December 8, 1923, United States Treaty Series No. 725.

4. Accord: *In re Wong Hoen's Estate*, 107 N.Y.S. (2d) 407 (Surrogate's Court, Kings County, August 16, 1951).

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Disagrees with Palmer on Holmes

■ If there be, as Mr. Palmer stoutly maintains, a body of natural law, ("The Totalitarianism of Mr. Justice Holmes", 37 A.B.A.J. 809; November, 1951) how is natural law to be found out? Who is to interpret it? Mr. Palmer rejects Holmes' doctrine that the best test of truth is its ability to get itself accepted in the market place. He has no confidence in evaluation by mere weight of numbers. We may agree that the crowd often chooses badly. But what man or institution can choose more wisely than the crowd itself *over the long run*?

Holmes frankly admitted that he was not God. If Mr. Palmer does not claim that he himself is God, he seems to think he knows who is. Holmes recognized no higher authority than the will of the majority of the people. Mr. Palmer appeals to natural law, as revealed to the insights of a minority (unnamed) even though an overwhelming majority of the people may disagree.

Even if there were such a thing as natural law, even if you could find it, how impose it on the majority of the people who will not accept it? It is not, I think, out of line to suggest that the excesses of prohibition and the Spanish Inquisition resulted when minorities, armed with self-discovered truth, imposed their will upon the majority.

I suggest that Mr. Palmer wholly misses the point. To my mind it is not important that the people choose wisely, *so long as they do their own*

choosing. Over the long run, no king or dictator, no church or Cominform can serve their best interests half so well as they themselves. Holmes was aware that the majority would often botch the job, yet the true democrat stood aside, unwilling to substitute his own personal judgments for those of the people. But today, the man who knew he was not God is condemned as another Hitler who was sure he was!

GARFIELD R. MORGAN

Lynn, Massachusetts

Article on Holmes Raises Two Questions

■ Ben. W. Palmer's article entitled, "The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy", prompts me to ask two questions:

On page 811, Mr. Palmer asks if morality meant to Holmes "what it means to men of religion or to those who are philosophically convinced that there is such a thing as absolute, immutable truth?" Again, on the same page, he refers to "absolute, objective truth".

My two questions are these:

(1) What are the principles of absolute, immutable, objective truth to which Mr. Palmer refers?

I think there will be insuperable difficulty in laying down any such principles which any three men would agree to, unless they are expanded into a statement as general and idealistic as the Golden Rule.

Our modern philosophers and scientists are not so confident as Mr. Palmer. They are cautious in stating

even scientific laws in absolute, immutable terms. Thus Alfred North Whitehead declares that the assumption that no modification of the laws of nature "is to be looked for in environments which have any striking differences from the environments for which the laws have been observed to hold, is very unsafe." And Bertrand Russell says bluntly that "no sensible person regards" scientific theories "as immutably perfect".

(2) The second question is,

How does such a principle of immutable, absolute, objective truth aid us in deciding an actual, concrete case at law, or indeed, a political controversy?

Some lawyers and judges thought that an employer should not be liable for an injury to an employee caused by the negligence of a fellow employee. They felt deeply that to hold the employer liable would violate natural law. But under our Workmen's Compensation Acts the employer is liable. They were the result of the feeling of other men that it was against natural law that an injured workingman should lose an arm or a leg and have his earning power destroyed or grievously diminished without any compensation.

My second question, then, is in what conceivable way does any principle of natural law settle this question, and I may add a thousand other questions that come before our courts?

If there is immutable, absolute law, how does it happen that courts of adjoining jurisdictions follow opposite rules on a host of questions?

Natural law may give us glowing ideals but it cannot aid us in deciding an actual controversy in a complicated question of contracts, property law, corporation law, or a host of problems in our modern machine age.

EDWARD R. LEWIS

Chicago, Illinois

"Is All Opposition Communist or Fascist"?

■ As an illustrious member of the Bar, Ben W. Palmer is well aware of

the distinction between decision and dictum. But his conviction of Mr. Justice Holmes as a totalitarian, in your December issue, rests in large part on his failure to keep that distinction in mind. The Holmes phrase that truth is "the majority view of that nation which can lick all others", has been quoted *ad nauseam* by the Justice's critics. Yet Holmes' defenders will be the first to admit that he had a rhetorical flourish which drew him into overstatement on occasions; dicta such as the one above must be compared with the true decisions of the Holmes mind.

Mr. Palmer mentions language from the *Abrams* dissent in the same breath as the "totalitarian" quotation noted above—the *Abrams* dissent which talked of truth's best test as the power of the thought to get itself accepted in the competition of the market—a free market, mind you. I invite Mr. Palmer's attention to the decision Mr. Justice Holmes sought in *Abrams*. Is the stalwart defense of a wretched minority group in the name of free speech "totalitarian"? And what of the Holmes' view in *Gillow v. New York* and *Whitney v. California*, cases which raise the same basic issues? Are these views in line with your article's amazing conclusion that if "Stalin conquers, then in the philosophy of Mr. Justice Holmes, atheistic communism will become the truth"?

But surely there is a more basic premise upon which these misconceptions—as I see them—are grounded. Consider the following syllogism taken from Mr. Palmer's piece: If a system of thought postulates that "there are no objective standards by which to judge a law as 'unjust' or 'morally bad' or violative of any higher law", then "This of course is totalitarianism." Here Mr. Palmer states, in the clearest terms (I submit), that all those who do not or cannot summon themselves to believe in natural law are totalitarians—in other words, "my opposition is all Communist or Fascist".

It seems to me that the argument concerning natural law should be

waged on its merits, not be the device of pinning scare labels on the advocates of an opposing school.

T. L. TOLAN, JR.

Milwaukee, Wisconsin

Calls Holmes Article "Shocking Lapse"

■ The title placed upon Mr. Palmer's latest contribution to the debate over Mr. Justice Holmes is a shocking lapse into Peglerism on the part of Mr. Palmer and the *JOURNAL*. Holmes was not a totalitarian and neither Mr. Palmer's piece nor any previous attack makes a rational pretence of proving that he was. Holmes did not believe in absolute, immutable transcendental truths. It has been argued, as Mr. Palmer now argues, that a philosophy lacking such a belief has "totalitarian implications". Surely Mr. Palmer and the editors of the *JOURNAL* have the perspicacity to distinguish between adherence to or approval of a particular political doctrine and harboring philosophical ideas which some people think by implication support that political doctrine. The characterization of Holmes has no more warrant than the characterization of every exponent of natural law as totalitarian because natural law can logically serve, and as a matter of historical fact has served, the cause of authoritarian government.

JACOB D. HYMAN

University of Buffalo
Buffalo, New York

"All Autocrats Believe in Absolute Truth"

■ Each time the *JOURNAL* publishes a diatribe against the philosophy of Justice Holmes, we read it avidly from beginning to end and then offer a silent prayer of gratitude to the Divine Source of Infinite Wisdom for blessing the American people with Justice Oliver Wendell Holmes. If the Justice was a totalitarian, so are we.

Nothing could more enhance the stature of Holmes than the frantic efforts of the apostles of authoritarian orthodoxy to destroy his immortal philosophy. Their watch-

word seems to be "Holmes delendus est!" and they are right. It is imperative to eradicate the reverence of the American people for Holmes' philosophy before the democracy, freedom of speech, and freedom of religion of Americans can be blacked out. How well they succeed will depend upon how afraid the American people are of each other and their susceptibility to the "deceptive claptrap of word thinking" in which Ben W. Palmer, McKinnon and Pegler seek to entrap them.

The critics of Mr. Justice Holmes label him a "totalitarian" (of all things!) because he did not believe in absolutes, or that morals and ethics have an "objective basis in eternal truth". We have observed that the autocrats of all ages, from the Babylonians to Hitler, Stalin, Franco and others we could name share a belief in absolute truth, ascertainable by themselves, and in moral and ethical standards based on an eternal truth they have perceived by their superior learning, intuition, reasoning or revelation.

That moral and ethical standards have an objective basis in eternal truth is refuted by archaeology, anthropology, history, sociology and psychology and religion itself. Witness the shift as between the Old and New Testaments on such subjects as polygamy, divorce, the Sabbath, etc.

Democracy is grounded upon the assumption that since man is a rational animal, and society is composed of individuals differing in ability, economic interest and intellectual opinion, the common welfare will be best served in the long run by government acting in response to the opinion of the majority, even though the majority may blunder in specific instances.

The function of government is not the ascertainment of absolute truth, but the equitable balancing, ultimately by force, of conflicting individual interests in society to the end that the members of society may live together in peace.

For the purposes of government that must be assumed to be true which in the long run gains accept-

ance in the market place, even if one disagrees with the popular judgment.

The genius of American democracy is that government, within broad constitutional limitations, is conducted in accordance with the will of the majority while the First Amendment of the Constitution forbids the punishment or censoring of any minority or individual persons for teaching men not to believe in the gods, for corrupting the youth (with ideas), or making the worse appear the better reason.

Belief in such a system of government was the core of Holmes' philosophy. It is a philosophy of individual freedom—the philosophy of Jefferson and the Founding Fathers, the philosophy of the Constitution.

Let us join Justice Holmes in "digging beneath the deceptive claptrap of word thinking" and preserve our liberty as free men.

GORDON MIFFLIN

Seattle, Washington

And Yet Another Protests Article on Holmes

■ Isn't it time to let up on Holmes, or at least publish an article by someone who does not think he is another Hitler? It begins to look as if you thought Palmer, McKinnon, *et al.*, had something.

T. A. BUHL

Batavia, New York

A Platitude or a Communist Axiom?

■ Re: Dr. Fleming and the Draft Covenant on Human Rights (page 795, October issue).

Not having had the benefit of a recent education at Berlin and Freiburg Universities, I am astonished to learn that all who accept the statement, "Work being the basis of all human endeavor" are committed to the doctrines of Marxism, materialism and atheism. Surely this is simply a universally accepted platitude.

Holding American and British degrees, I am generally considered an educated man, and I have never read such utter nonsense in any magazine.

In the name of education, intelligence and common sense, I protest!

STANLEY M. UDALE

Detroit, Michigan

A Treacherous Negative Changes the Meaning

■ In regard to my article which appeared in your December, 1951, issue: Why was the title changed so that as it now appears it declares the contrary point expressed in my article?

In reading your editorial I find that we are not far apart at all—though you (or the editorial writer) so seem to say. You indicate this by quoting another portion of my definition of conspiracy. Can there be a rebellion without there first being a conspiracy? Thus the yardstick is still the differentiation between heresy and conspiracy.

Perhaps you can rectify the point as to the article's misleading title in a subsequent issue.

ARTHUR S. KATZ

Editor's Note: The mistake was the result of the injudicious insertion of the treacherous word "not" in the title of Mr. Katz' article. The original title had to be changed, for typographical reasons, just before the December issue of the JOURNAL went to press. A staff member in search of a new second line remembered that the article was a reply to an article written by Frederick Bernays Wiener and hastily took the second line of the title of Mr. Wiener's article and added the word "not" under the impression that that addition expressed a thought opposite to the one contained in the Wiener essay. The incident may therefore be blamed upon the twin bugaboos of every publication: headlines and deadlines. Our apologies to Mr. Katz and JOURNAL readers.

A Definition of "An Ideal Lawyer"

■ I beg to submit for your consideration a thought taken from Greenleaf, as to the kind of lawyer Judge Story would create, which you may publish in the JOURNAL if it appears to you to be of sufficient interest,

especially to young lawyers, to justify publication. . . .

Some time ago, using the Library of Congress to study the life of Greenleaf, I came across the above thought.

In my humble opinion the greatest book ever written, excepting the Bible, is Greenleaf's *Testimony of the Evangelists*.

AN IDEAL LAWYER

Professor Simon Greenleaf, Royall (afterwards Dane) Professor of Law in Harvard University, in a discourse upon the life and character of Hon. Joseph Story, an associate justice of the Supreme Court of the United States, and Dane Professor of Law in Harvard University, said:

"The lawyer whom he would create, he would first of all have an honest and virtuous man,—a man of deep religious feeling, of incorruptible integrity, of high and holy aspirations, of spotless purity in private life, of expansive benevolence, of exalted patriotism. He would have him administer the law as an angel of mercy; concerning himself with controversies only to bring them, if possible, to an amicable, but at all events to a just and righteous termination. He regarded the lawyers' first service as due to the preservation of peace and mutual kindness among men; his next to the impartial administration of the law. In his own appropriate language, he described the advocate of his choice as one who loved the law, as a science, and not as a trade; who felt the full dignity of his profession, and deemed himself under deep responsibility, not to his client alone, but to the court and to the cause of public justice—one who studied to know what the precepts of the law were, that he might apply them to his cause, and not pervert them to the triumph of injustice, or swell the trophies of cunning, or avarice, or profligacy;—whose notions of professional morals and obligations were far different from such mean and debasing patterings with conscience;—one who disdained to mislead the court or jury,

if he could; and who gave to both, on all occasions the support and instruction of his ample studies."

VERNON C. BARKER

Mendota, Virginia

Is the Russian Patent System Still Alive?

■ I have read with interest in your December number Mr. Lutz' article "A Proper Public Policy on Patents", and agree with much of what he says and would even go further, but there

seems to be a serious error in his first paragraph.

The Russian patent system seems to be still alive. The magazine *Chemical Abstracts* indexed U.S.S.R. Patent No. 69877 dated December 31, 1947, and others almost as recent.

I am of opinion that Russian patents are not and never have been really comparable to United States patents or comparable to the patents of any other modern nation.

I would welcome a much needed attack on them as mere bureaucratic favors, as I understand they probably work out in reality.

I hope a correction by Mr. Lutz will prove to be an even stronger attack on the whole Russian system of economic theory which I regard as fundamentally fallacious and ultimately self-destructive.

EDWARD THOMAS

New York, New York

Law Lists

(Continued from page 138)

Probate Law Lists

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Chicago 4, Illinois

SULLIVAN'S PROBATE DIRECTORY

Sullivan's Probate Directory, Inc.
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London, W. C. 2, England

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Parker Street
London, W. C. 2, England

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4 New Zealand Avenue
London, E. C. 1, England

In the examination of law lists the Standing Committee on Law Lists does not concern itself with the probable value of a listing to prospective subscribers. Some of the questions with which the Committee is concerned are whether charges are uniform within cities, whether complete disclosure of all facts surrounding a listing is made prior to the execution of a contract, and whether contracts make complete disclosure of what is covered by the contract.

Contract forms as submitted to prospective subscribers must:

1. Disclose whether the publisher is a corporation, partnership or an individual. If the publisher is an individual or a partnership, the name of the individual or the names of the individual partners in the partnership should be stated.

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for in excess of the basic amount, the rate charged for each additional word, line or unit of space in excess of the basic amount and the total amount charged for such additional words, lines or units of space.

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7. Include a complete schedule of rates according to classifications of listing—if it is a publisher's practice to vary his charges within a city according to classification of listing.

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A law list publisher who seeks or has obtained a certificate from this Committee may not list a lawyer's name without contract and later attempt to collect for said listing. A publisher who is soliciting contracts for a new law list may not collect listing charges in advance of publication.

All inquiries regarding law lists should be directed to the Standing Committee on Law Lists, 209 South La Salle Street, Chicago 4, Illinois.

Practicing lawyer's guide to the current LAW MAGAZINES

Calvin P. Sawyer • Editor-in-Charge

ANTITRUST LAW—"*The Amendments to Section 7 of the Clayton Act*": A comment in the July-August, 1951, issue of the *Illinois Law Review* (Vol. 46—No. 3; pages 444-464) gives a comprehensive analysis of the recent acquisition of assets provision, which has breathed new life into an old and dormant statute. Just how much life—whether a Frankenstein monster, an abortive birth, or issue of more legitimate proportions—is fully and adequately discussed, with much reliance necessarily being placed on the legislative committee reports. The relation to and possible significance of the judicial decisions under Sections 2 and 3 of the Clayton Act, the possible defects in the new drafting, and the means of enforcing the amendment are also discussed. This comment should be a valuable general reference and check-guide for the many lawyers who have, since the amendment to Section 7 became effective, had to wrestle with the amendment's meaning in reference to the multitude of particular business transactions which are within its possible scope. (Address: Illinois Law Publishing Corp., Northwestern University School of Law, Chicago 11, Ill.; price for a single copy: \$1.25.)

CONSTITUTIONAL LAW—"*Freedom of Expression and the Function of Courts*": This article by Elliot L. Richardson in the November, 1951, issue of the *Harvard Law Review* (Vol. 65—No. 1; pages 1-54), is a systematic and comprehensive presentation of the highly important constitutional issue of free speech presented in the United States Supreme Court's recent opinion in *Dennis v. United States*, which affirmed the convictions of eleven

Communist Party leaders for violation of the Smith Act. Mr. Richardson is eminently qualified to address himself to the legal aspects of this problem, for he has recently been law clerk to both Judge Learned Hand and Justice Frankfurter, members, respectively, of the two appellate courts which passed on the case. The difficulties in striking a balance between free speech and a particular apprehended harm are many and the author discusses problems of proof, the role of judicial notice and deference to legislative judgments. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: \$1.00.)

FUTURE INTERESTS—"*Drafting, Tax, and Other Consequences of the Rule of Early Vesting*": Writing in *Illinois Law Review* (Vol. 46—No. 3; pages 407-442), Professor Daniel M. Schuyler makes a fresh appraisal of the historical and other bases for the constructional rule of early vesting of estates in the light of present-day legal facts. The author is a recognized expert on Illinois future interests law and his case material is predominately taken from Illinois decisions. But the policy arguments and broad considerations underlying this article are of general scope and importance. Specific suggestions for draftsmanship are included. The author concludes that "social changes have robbed it [the rule of early vesting] of its once great virility" and that the draftsman should not rely on the venerable dogma that "the law favors the early vesting of estates". (Address: Illinois Law Publishing Corp., Northwestern University School of Law, Chicago 11, Ill.; price for a single copy: \$1.25.)

INSURANCE—"*Legal Problems in the Organization and Operation of Group Health Plans*": This article by Horace R. Hansen, in the December issue of the *Vanderbilt Law Review* (Vol. 5—No. 1; pages 14-36) is a pioneering article. It treats first the organization of a group health plan—legal authority to organize and provisions to include in the articles of incorporation and by-laws. It then considers the form of the members' service contracts, the terms and provisions to be included and aspects of interpretation. Consideration of the physicians' contract and the terms and provisions in it is the final matter discussed. (Address: Vanderbilt Law Review, Vanderbilt University, Nashville 4, Tenn.; price for a single copy: \$1.50.)

LEGAL PROFESSION—"*Statement of Principles of Federal Income Tax Practice by Lawyers and Certified Public Accountants*": This article by John Philip Goeder in the summer, 1951, issue of the *Notre Dame Lawyer* (Vol. 26—No. 4; pages 599-619) is an analysis of the attempt to settle professional jurisdiction in the disputed area between law and accounting, a problem brought into focus by the *Bercu* case. The author is both an attorney and a certified public accountant and his approach is candid and forthright. (Address: Notre Dame Lawyer, University of Notre Dame, Ind.; price for a single copy: \$1.00.)

UNITED STATES SUPREME COURT—In the November, 1951, issue of the *Harvard Law Review* (Volume 65—No. 1; pages 107-183) appears the annual summary and analysis of the most significant decisions of the United States Supreme Court during the term just ended. This summarization, divided into various subject-matter headings, is detailed enough for specific reference use as well as comprehensive and succinct enough for general reading. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: \$1.00.)

Special Train to San Francisco Meeting

■ Arrangements for the operation of a Special Train to the San Francisco Meeting have been completed.

The special will leave Chicago Union Station at 10:00 A.M., Sunday, September 7 and arrive at San Francisco, Sunday morning, September 14.

The route is via the Burlington and Santa Fe with stops for sightseeing at Santa Fe, Grand Canyon, the Los Angeles area and Yosemite.

The Special Train also makes a return trip, leaving San Francisco, at 4:00 P.M., Friday, September 19, arriving Chicago, 10:00 A.M., Thursday, September 25.

The trip east will provide opportunity to sight-see in and about Ogden, Utah, and a two-and-one-half day visit at Sun Valley.

THREE TOUR COMBINATIONS OFFERED

TOUR "A" Is the complete tour from Chicago to San Francisco by way of Los Angeles and return to Chicago, via Sun Valley.

TOUR "B" Is the same tour from Chicago to the arrival San Francisco only.

TOUR "C" Is the return trip from San Francisco via Sun Valley to Chicago.

TOUR COSTS

The tour costs shown below (subject to change) in column "Without Railroad Ticket" include for Tour A and B, between Chicago and San Francisco:

Pullman according to your selection. All meals, on and off trains, from Chicago to Los Angeles—no meals in Los Angeles except lunch at the Hollywood Roosevelt

and dinner at the Biltmore Bowl, September 11. Included is breakfast at Fresno and lunch and dinner in Yosemite. All sightseeing as described at Santa Fe, Grand Canyon, Los Angeles, and Yosemite. Transfer of persons and baggage at Los Angeles. Applicable federal and state taxes. Cocktail hour at Santa Fe. Twin bedded room with bath at the Biltmore, Los Angeles.

No services are provided nor expenses included during the San Francisco Meeting.

The tour costs for Tour A and C, in column "Without Railroad Ticket" include the following on the return trip, San Francisco to Chicago:

Pullman according to your selection. All meals on and off the train between San Francisco and Chicago. All sightseeing as described at Ogden, Utah. Ski chair lift ride and transportation to Trail Creek at Sun Valley. Two-to-twin-bedded room with bath at Sun Valley Lodge. Applicable federal and state taxes.

Not included on Tour A, B, or C, are tips for waiters, waitresses, or porters, no hotel extras such as phone calls, laundry, beverages, and purely personal expenditures.

These figures shown under "Including Railroad Ticket from Chicago" include the same services, items and privileges, as do the figures in the column "Without Railroad Ticket", plus a first-class roundtrip from Chicago to San Francisco, and return to Chicago, via the route of the Tour. These rates are quoted that persons joining at Chicago may add to them their transportation charges to Chicago and thereby better compute the complete costs of their trip.

	Tour A		Tour B		Tour C	
	Chgo. to Chgo.		Chgo. to SanFran.		SanFran. to Chgo.	
	Without Railroad Ticket	Including RR Ticket from Chgo.	Without Railroad Ticket	Including RR Ticket from Chgo.	Without Railroad Ticket	Including RR Ticket from Chgo.
1 person in a lower berth.....	\$274.55	\$429.59	\$142.70	\$296.74	\$126.46	\$271.88
1 person in an upper berth.....	257.14	411.18	133.22	287.26	118.53	263.95
1 person in a roomette.....	304.05	458.09	158.51	312.55	140.15	285.57
2 persons in a bedroom, each.....	281.91	435.95	146.61	300.65	129.91	275.33
2 persons to a compartment, each.....	305.05	459.09	158.95	312.99	140.71	286.13
2 persons to a drawing room, each.....	311.33	465.37	178.35	332.39	157.00	302.42
3 persons to a drawing room, each.....	294.20	448.24	153.26	307.30	135.55	280.97

For Further Details, Illustrated Literature and Reservations, Write as Early as Possible to

W. M. Moloney
General Agent, Burlington Lines
105 W. Adams Street
Chicago 3, Illinois

Hawaiian Holidays and the Annual Meeting

■ The Annual Meeting at San Francisco, September 15 to 19, offers an opportunity to combine a trip to California with a visit to the Hawaiian Islands. Two trips have been arranged.

TRIP A — For the convenience of those who would prefer to visit the Islands prior to the Annual Meeting.

TRIP B — For those who may desire to make the trip after the Annual Meeting.

Both trips are alike—by steamer in one direction and air in the other, require the same number of days for the roundtrip, stop at the same hotel, follow the same program in the Islands and cost the same amount. Here is an outline of the trips as planned:

SCHEDULE					
Prior Tour A			Post Tour B		
Lv. Los Angeles	SS Lurline	4:00 PM Aug. 25	Lv. San Francisco	Via PAA	10:59 PM Sept. 19
Ar. Honolulu	SS Lurline	9:00 AM Aug. 30	Ar. Honolulu	Via PAA	6:45 AM Sept. 20
14 days in the Islands			OR		
Lv. Honolulu	Via PAA	6:30 PM Sept. 12	Lv. San Francisco	Via UAL	10:30 AM Sept. 20
Ar. San Francisco	Via PAA	6:30 AM Sept. 13	Ar. Honolulu	Via UAL	6:45 PM Sept. 20
OR			14 days in the Islands		
Lv. Honolulu	Via UAL	9:00 AM Sept. 13	Lv. Honolulu	SS Lurline	4:00 PM Oct. 4
Ar. San Francisco	Via UAL	8:45 PM Sept. 13	Ar. Los Angeles	SS Lurline	9:00 AM Oct. 9

COST OF TOURS (Subject to Change)

The cost of the Tours (A and B) vary according to selection of accommodations aboard the *S. S. Lurline*. The costs are:

Inside stateroom (2 to a room) each.....	\$ 744.70 to \$784.95
Outside stateroom (2 to a room) each.....	790.70 to 894.20
Deluxe stateroom (2 to a room) each.....	963.20
Inside stateroom single occupancy.....	977.35
Outside stateroom single occupancy.....	1055.85

These costs include:

Air transportation one-way, meals and refreshments aloft.

Stateroom of your selection, all meals and one-way passage aboard the *S. S. Lurline*.

Transfer of person and baggage between dock or air field and Royal Hawaiian Hotel.

All federal transportation taxes and Hawaiian Hotel tax.

Meals and lodging (American Plan), superior outside rooms with bath at the Royal Hawaiian Hotel on Waikiki Beach in Honolulu.

Special arrangements.

Not included:

Gratuities to waiters, maids, etc., and strictly personal expenditures.

For Further Details, Illustrated Literature and Reservations, Write as Early as Possible to

W. M. Moloney
General Agent, Burlington Lines
105 W. Adams Street
Chicago 3, Illinois

OUR YOUNGER LAWYERS

Robert A. Stuart, Secretary and Editor-in-Charge, Springfield, Illinois

■ Through this section entitled "Our Younger Lawyers" which appears each month in your AMERICAN BAR ASSOCIATION JOURNAL, the Secretary of the Junior Bar Conference undertakes to report to the general membership of the American Bar Association, and more particularly to the members of the Junior Bar Conference and the law student members of the American Law Student Association in the various law schools across the nation, the progress of the various activities of the Junior Bar Conference. In the January issue appeared a brief review of the program to be undertaken by the conference during the year 1952 as outlined by Chairman Paul W. Lashly, of St. Louis. In succeeding issues will appear reports of the activities of the various committees whose function it is to carry out that program.

However, perhaps, at this time something should be written in explanation of the nature and purpose of the Junior Bar Conference itself—just what it is, how it operates and what it does.

Briefly stated, the Junior Bar Conference is a Section of the American Bar Association composed of all members of the Association in good standing not over the age of 35 years. In organization it is, in effect, a congress of statewide and local bar associations of young lawyers which are wholly autonomous and self-governing, yet affiliated with the Conference pursuant to the provisions of its constitution and by-laws.

Its purposes and objectives as summarized in its constitution are (1) to stimulate the interest of law students and younger members of the Bar in the highly worthwhile objectives of the American Bar Association, (2) to provide a basic program of activity designed to be of interest and benefit to such law students and younger members of the profession and (3) to provide an efficient medi-

um for co-operation between state and local associations.

To accomplish these general purposes, the work of the Conference is carried on through a number of national committees, with membership representing each geographical section of the United States. Members of these national committees are recommended by the State Chairmen of the Junior Bar Conference in each of the forty-eight states, Hawaii, Puerto Rico and Alaska.

Generally speaking, these committees of the Conference fall within three categories: organizational, action and research. Present organizational committees include: Annual Meeting, "The Young Lawyer", Membership, By-Laws and Activities. Among the action committees are Co-operation with Junior Bar Groups, Inter-American Bar, Public Information Program, Defense Mobilization, War Readjustment, Continuing Legal Education, Law Students, Unauthorized Practice, Courts of Limited Jurisdiction and Traffic Courts. Research committees are Procedural Reform and Lawyer Placement.

It will be readily noted that a number of these committees are primarily designed to assist the American Bar Association in its general program, while others are constituted to effect a national program instituted by the Conference. In both these categories of activity the Conference functions through an affiliated state or local association. Conversely, it is a basic function of the Conference to assist these associations in the accomplishment of their local objectives, making available the experience and programs of others.

During the period between annual meetings of the Conference, held in conjunction with the Annual Meetings of the American Bar Association, control of the affairs of the

Conference is vested in an Executive Council composed of the national officers, the last retiring Chairman, a member from each Federal Judicial Circuit, the District of Columbia and two members at large. Although elected at the Annual Meeting, the officers and Council serve on a calendar-year basis.

From this brief outline of its organization and purposes the broad scope of the program of the Junior Bar Conference becomes apparent. It should also become obvious that the Conference, if it is to accomplish its purpose, depends upon the effectiveness of its various affiliated state and local associations.

However, the questions most often raised by the local or state association considering affiliation with the Conference are, "What can our association derive from so broad a program as that carried on by the Conference when we are confronted with local problems which may or may not be included in that program?" "Why should we concern ourselves with fields of activity which do not constitute problems in our particular state or locality?" While the Conference fully realizes that all phases of its national program are not adaptable to all sections of the United States, nevertheless it is felt that any state or local association can and will benefit substantially from its participation in some portion of the program, and from the experiences of similar associations in the same or similar fields. For the local association seeking to develop a program where previously none existed, it is further felt that the national program of the Conference offers a sound basis for such development. It must be borne in mind that unless the national program serves to provide such assistance to the state or local association it accomplishes little.

Perhaps of lesser importance is the experience to be gained by the individual participating in Conference activities. Through the program of the Conference the younger lawyer finds a ready opportunity to become closely acquainted with the

organization and work of the organized Bar at the national level. Through his participation in that program he can justifiably take pride in the contribution made to the general welfare of the profession of which he is a member.

The Conference is in urgent need of the benefit of the experience of the many outstanding local associations throughout the nation which have not yet become affiliated. Requests for information regarding affiliation of state and local associa-

tions with the Junior Bar Conference should be addressed to the National Secretary or to Thomas H. Law, Chairman of the Committee on Co-operation with Local Bar Groups, 1404 Commercial Standard Building, Fort Worth, Texas.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

AMOS M.
PINKERTON



■ Amos M. Pinkerton, of Taylorville, is the new Executive Secretary of the Illinois State Bar Association. He succeeds the late Charles B. Stephens, of Springfield, and assumed his new duties on January 1.

Mr. Pinkerton, a practicing lawyer for over twenty years, has been Association treasurer since 1945. Prior to his election by the board of governors, he was a partner in the firm of Provine, Pinkerton and Miley, of Taylorville. As Executive Secretary, Mr. Pinkerton will be in charge of the Association's headquarters in Springfield and will direct its numerous activities including public relations, the legislative program, legal aid and lawyer placement service.

■ The University of Arizona College of Law was the winner in the final round of the National Moot Court Competition sponsored by the Committee on Junior Bar Activities of The Association of the Bar of the City of New York. Arizona's opponent was Georgetown University Law School, the winner of last year's competition. Associate Justice Harold H. Burton presided over the court which selected Arizona as the winner; his associates were Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit, Judge Edmund H. Lewis of the New York State Court of Appeals, Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, and Whitney North Seymour, President of The Association of the Bar.

In the semifinal rounds Georgetown won over North Carolina and Arizona over Pennsylvania. Judges for these arguments were United States Federal District Court Judges Harold M. Kennedy and Edward Weinfeld, Justice Edward S. Dore of the Appellate Division of the New York Supreme Court, New York Supreme Court Justice Charles D. Breitel, Harrison Tweed, President of the American Law Institute, and Sinclair Hatch, Chairman of the Executive Committee of The Association of the Bar.

In the first preliminary round Cornell won over Northeastern, St. John's over Indiana, Pennsylvania over Catholic, Georgetown over Miami, North Carolina over Notre Dame, Kentucky over Tulane, and Arizona over Ohio State. Vanderbilt drew a bye for this round. In the second preliminary round Georgetown won over Cornell, North Carolina over St. John's, Arizona over Kentucky, and Pennsylvania over Vanderbilt.

Arizona was represented by Charles E. Ares of Tucson and Henry A. Kiker, Jr., of Santa Fe, New Mexico, both third-year students in the law school. The winners were presented with the Samuel Seabury Award, in addition to sets of the United States Supreme Court Digest.

LESTER P.
DODD



■ Lester P. Dodd was elected seventeenth President of the State Bar of Michigan. Mr. Dodd has been a member of the Board of Commissioners of the State Bar since 1945 and has served during the past year as First Vice President. As a member

of the American Bar Association, Mr. Dodd has been active principally in the Insurance Section and on the State Membership Committee.

■ For the past four years the Southwestern Legal Foundation has presented a series of annual institutes dealing with specialized branches of the law, such as oil and gas law, taxation, labor law, insurance, trial tactics and international law. This year the Foundation is presenting an institute on personal injury litigation. Such subjects as the proper examination of the person and his injury, the structure of the body in its relation to trauma, back injuries, examination of medical witnesses and adequacy of awards in personal injury cases were discussed by leading lawyers and doctors.

■ In December the Massachusetts State Bar Association held a testimonial dinner in honor of Frank W. Grinnell, for thirty-five years the secretary of the Association.

Dean Clarence Manion of the University of Notre Dame College of Law was the principal speaker. Other speakers included Robert G. Dodge, of Boston, who presented a citation to Mr. Grinnell, and Louis E. Wyman of Manchester, New Hampshire.

■ Rosemary Scott, of Grand Rapids, was elected the 1951-1952 Chairman of the Junior Bar Section of the State Bar of Michigan. Miss Scott has been active in bar affairs since her graduation from the University of Michigan Law School in 1946. At law school she was a member of the *Michigan Law Review*, and a holder of a Cook Fellowship in Inter-American Law and of the Edwin C. Goddard Scholarship.

As Chairman of the Section, Miss Scott arranged the regional law school competition of the National Moot Court Competition sponsored by The Association of the Bar of the City of New York.

■ This year the Queens County Bar Association is celebrating its seventy-fifth anniversary. A number of special events have already been held as part of the year-long celebration.

In February at the Annual Association Dinner the entire Bench of the Court of Appeals was present. In March the Association will sponsor a community night at the Forest Hills High School to demonstrate to the public the importance of the law, the lawyer and the courts to our way of life. The Queens College Symphony Orchestra and its a cappella choir will render musical selections. Judge Harold R. Medina will give the principal address in his capacity as Chairman of the Section of Judicial Administration of the American Bar Association. His

speech will draw public attention to the work of his Section so that the community and the country may appreciate the very substantial contribution that the Section is making towards improving the judicial administration. At that time, also, prizes will be awarded to high school students in the county who are participating in an essay contest which the Association is conducting in the schools as part of their Jubilee activity. The subject for the essay is "What the Bill of Rights Means to You".

■ Interesting and varied activities during the past several months have been reported by the Committee on Continuing Legal Education of the American Law Institute collaborat-



Bar Activities

ing with the American Bar Association.

New members of the Committee, appointed to four-year terms are Harold F. Birnbaum, Los Angeles; Robert P. Goldman, Cincinnati; Arthur Littleton, Philadelphia; Alfred P. O'Hara, New York; and T. Hartley Pollock, St. Louis. They succeed Herbert W. Clark, San Francisco; Homer D. Crotty, Los Angeles; Paul B. DeWitt, New York; Bernard G. Segal, Philadelphia; and Charles E. Wyzanski, Boston, whose terms of office expired. Howard L. Barkdull, Cleveland, becomes a member *ex officio* during his term of office as President of the American Bar Association.

Two new books have been added to the growing list of practical publications of the Committee. They are *Preparation for Trial of Civil Actions; Reinforcements for Preparation*, by Eustace Cullinan and Herbert W. Clark, of the San Francisco Bar; and *Preparation and Trial of Cases before the United States Tax Court*, by Loyal E. Keir, of the Iowa Bar.

Publications of the Committee are available at \$2.50 per copy. Inquiries should be directed to 133 South 36th Street, Philadelphia 4, Pennsylvania.

A new, smaller series, based upon recent developments in important fields of the law is being prepared, perhaps two of which will be pro-

duced per year. The first of these, *Recent Developments in Conflict of Laws*, by Herbert F. Goodrich and Paul A. Wolkin, of Philadelphia, has already been published. It sells for \$1.00 per copy.

The Committee is participating in an imposing number of institutes and lecture courses throughout the country during the fall and winter:

Philadelphia, Decedents' Estates and Trusts (11 lectures) 440 enrolled, Francis X. Quinn, Chairman.

Pennsylvania, institutes in Norristown (Elvin R. Souder, Chairman), York (Spencer R. Liverant, Chairman), Lancaster (Anthony R. Appel, Chairman), Harrisburg (Harold R. Prowell, Chairman), Pittsburgh (Clair V. Duff, Chairman), Lewistown (Harry L. Siegel, Chairman), Williamsport (Clyde L. Williamson, Chairman), Easton (Robert Ungerleider, Chairman), Pottsville (Alexander E. Lipkin, Chairman) Wilkes-Barre (Charles L. Casper, Chairman), and Milford (Sidney Krawitz, Chairman). It is interesting to note that the population of Milford is only 1,000, the smallest community in which the Committee has participated in courses.

Maryland, Organizational Problems of Small Businesses, January 25, 1952, R. Carleton Sharretts, Jr., Chairman.

North Carolina, Organizational Problems of Small Businesses, lec-

turer Leonard Sarner, Philadelphia, on successive days in Hickory, Winston-Salem, Greensboro, Greenville, Raleigh and Fayetteville.

Georgia, Selected Legal Problems of Small Businesses, mid-winter meeting, Georgia Bar Association, (Atlanta) Hugh M. Dorsey, Chairman.

Florida, Trial Practice (Jacksonville), Frank H. Elmore, Jr., Chairman.

Tennessee, Estate Planning (Vanderbilt University Law School, Nashville), William J. Bowe, Chairman.

Kentucky, Taxation (Louisville), Robert W. Spragens, Chairman.

Oklahoma, Trial Practice, Annual Meeting, Oklahoma Bar Association (Oklahoma City), Howard T. Tumilty, Chairman.

Nebraska, Organizational Problems of Small Businesses, Annual Meeting, Nebraska State Bar (Omaha), George H. Turner, Chairman.

North Dakota, Taxation, Oil and Gas Law, Floyd B. Sperry, Chairman.

Michigan, Law Office Management, Charles W. Joiner, Chairman.

As of the end of 1951, the Committee will have participated in some 200 institutes in thirty-eight states, with the aggregate attendance in excess of 20,000. More than 50,000 copies of the Committee's publications have been sold and are in use by members of the Bar throughout the country.

A Plan for Equitable Tax Treatment

(Continued from page 114)

income and the basic rates were the same as in the Internal Revenue Code prior to the Revenue Act of 1951. There was, however, a 10 per cent increase in the amount of tax for each of the first four years, a 40 per cent reduction in the amount of tax for the fifth year, a 5 per cent reduction in the amount of tax for the sixth year, a 12 per cent reduction for the seventh year, a 9 per cent reduction for the eighth year, no re-

duction for the ninth year, and a 12 per cent increase for the tenth year. The average income and the tax due from this individual for the tenth year of the averaging period would be computed as shown in the tables on page 171.

The illustration on page 172 shows the computation of a refund. The basic facts are the same in both cases, except that the net income for the tenth year is \$4,000 instead of \$50,000.

The Secretary of the Treasury at the 1947 hearings before the Committee on Ways and Means on reve-

nue revision stated that "the adoption of averaging would result in a substantial loss of revenue".²⁸ This would not be true under the plan at least for the first year it is in effect since the revenue received by the Government would be equal to or higher than that collected under existing law. This is so because under the plan the income taxed the first year would be exactly the same as under existing law. The tax col-

28. Statement of John W. Snyder, Secretary of the Treasury, Hearings before Committee on Ways and Means on Revenue Revisions (1947-48), 80th Cong., 1st Sess., Part 1, 11-12.

Schedule L—Computation of Average Income and Tax or Refund²⁹

Line	Item	
1.	Number of preceding years in averaging period (line 6 of last year's return)	9
2.	Average income or loss in last year's return (line 7)	\$ 25,000.00
3.	Product of lines 1 and 2	\$225,000.00
4.	Net income or loss of current year	\$ 50,000.00
5.	Total income or loss for averaging period	\$275,000.00
6.	Number of years in averaging period (line 1 plus 1)	10
7.	Average income or loss (line 5 divided by line 6)	\$ 27,500.00
8.	Increase in average income (line 7 minus line 2)	\$ 2,500.00
9.	Decrease in average income (line 2 minus line 7)	\$
10.	Tax on income reported in line 7	\$ 9,301.60
11.	Tax on amount in line 8 (at rates in highest applicable brackets)	\$ 1,075.00
12.	Tax on amount in line 9 (at rates in next succeeding brackets)	\$
13.	Tax on increase in average income (line 11 multiplied by line 1)	\$ 9,675.00
14.	Tax on decrease in average income (line 12 multiplied by line 1)	\$
15.	Total tax or credit (line 10 plus line 13 or minus line 14)	\$18,976.60
16.	Add (line 3, Schedule N.)	\$
17.	Subtract (line 6, Schedule N.)	\$ 279.50
18.	Tax due	\$18,697.10 ³⁰
19.	Tax refund	\$

Schedule M—Computation of Net Cumulative Percentage Addition to or Deduction from Tax

Line	Increase	Decrease
1. Preceding year (net)	0%	26% ³¹
2. Current year	12% ³²	0%
3. Net % increase or decrease	0%	14%

Schedule N—Computation of Addition to or Deduction from Tax

Line	Amount	Line 1 Schedule M.	
		Increase	Decrease
1. Line 11, schedule L.	\$	0%	xxx
2. Line 12, schedule L.	\$	xxx	0%
3. Amount carried to line 16, schedule L.			\$
4. Line 11, schedule L.	\$1,075.00	xxx	26% \$279.50
5. Line 12, schedule L.	\$	0%	xxx \$
6. Amount carried to line 17, schedule L.			\$279.50

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lected, however, may be higher under the proposal because there would be an incentive for the individual to earn more income.³³ There would also be no advantage in establishing tax losses; and there would be no carry-back or carry-forward of net operating losses.

After the first year there would be no reduction in revenue unless there is a general decline in the incomes of individuals. But taking the country as a whole the question of loss of revenue may be more apparent than real. In any event comparing it with the loss under the existing system,³⁴

29. For the first year of the averaging period the individual would be instructed to place a zero in lines 1, 2, and 3 of Schedule L and line 1 of Schedule M. Provision would be made on the return for the allowance of credit for partially exempt interest and for taxes paid to foreign countries and possessions of the United States. Int. Rev. Code Secs. 25(a), 31.

30. This tax plus the taxes paid and less the refunds received for the preceding nine years equals the aggregate tax paid by an individual whose income was \$27,500 in each of the ten years.

31. This is the net cumulative percentage carried forward from line 3 of Schedule M of the preceding return, representing in this case the nine preceding years.

32. This percentage for the current year would be printed on the form in the proper column.

33. The Congress now has an opportunity not only to equalize the tax burden among all individuals with the same income but to reward all who strive to attain their maximum earning capacity at a time when the need for revenue is great. Individuals required to pay the high taxes in effect today would be more willing to pay them when they know that their contribution at this time of national emergency would also benefit them when they themselves may be faced with misfortune. In other words, individuals would be more willing to earn additional income even if 92 per cent of it is going to the Government when they know that if at a future time their income declines a portion of the 92 per cent they paid to the Government will be returned to them or credited against their then tax.

34. See Notes 11, 12, 13, 14, 16, 19 and 21 supra. Other sources of loss of revenue under the existing system are deferred compensation contracts, tax-loss sales, conversion of ordinary income into capital gains or capital losses into ordinary deductions, etc.

A Plan for Equitable Tax Treatment

Schedule L—Computation of Average Income and Tax or Refund³⁵

Line	Item	
1.	Number of preceding years in averaging period (line 6 of last year's return)	9
2.	Average income or loss in last year's return (line 7)	\$ 25,000.00
3.	Product of lines 1 and 2	\$225,000.00
4.	Net income or loss of current year	\$ 4,000.00
5.	Total income or loss for averaging period	\$229,000.00
6.	Number of years in averaging period (line 1 plus 1)	10
7.	Average income or loss (line 5 divided by line 6)	\$ 22,900.00
8.	Increase in average income (line 7 minus line 2)	\$
9.	Decrease in average income (line 2 minus line 7)	\$ 2,100.00
10.	Tax on income reported in line 7	\$ 7,147.84
11.	Tax on amount in line 8 (at rates in highest applicable brackets)	\$
12.	Tax on amount in line 9 (at rates in next succeeding brackets)	\$ 848.00
13.	Tax on increase in average income (line 11 multiplied by line 1)	\$
14.	Tax on decrease in average income (line 12 multiplied by line 1)	\$ 7,632.00
15.	Total tax or credit (line 10 plus line 13 or minus line 14)	\$ (484.16)
16.	Add (line 3, schedule N.)	220.48
17.	Subtract (line 6, schedule N.)	\$
18.	Tax due	\$
19.	Tax refund	\$ 263.68 ³⁶

Schedule M—Computation of Net Cumulative Percentage Addition to or Deduction from Tax

Line	Increase	Decrease
1. Preceding year (net)	%	26% ³⁷
2. Current year	12% ³⁸	%
3. Net % increase or decrease	%	14%

Schedule N—Computation of Addition To or Deduction from Tax

Line	Amount	Line 1 Schedule M.		
		Increase	Decrease	
1. Line 11, schedule L.	\$	%	xxx	\$
2. Line 12, schedule L.	\$848.00	xxx	26%	\$220.48
3. Amount carried to line 16, schedule L.				\$220.48
4. Line 11, schedule L.	\$	xxx	%	\$
5. Line 12, schedule L.	\$	%	xxx	\$
6. Amount carried to line 17, schedule L.				\$

there probably would be no difference between the amount of revenue collected by the Government under either system. Under existing law net business losses may be carried back one year and carried forward five years; net capital losses may be carried forward five years; long-term compensation may be spread over the period of service; and various devices may be used to reduce taxes.

On the other hand, under the plan individuals would be permitted to average their income earned during minority; from 21 through 30 years of age; from 30 through 55 years of age; and from 55 years of age to death. At any particular time there would be some who would be starting an averaging period, some who would be ending an averaging period, and others who would be in various stages of an averaging period. Whatever loss there may be would not be concentrated in any particular year. Moreover, there would be no advantage under the plan for individuals to take losses merely for tax purposes. On the contrary, there would be an incentive to earn more income or to accelerate its receipt so that, as a practical matter, the plan would favor increasing rather than decreasing current tax collections. In other words, the plan for averaging income would reverse the existing procedure—where taxpayers determine when and in what form transactions should take place in order to produce the greatest tax advantage—and permit them to consummate transactions as and when dictated by business reasons and, at the same time, enable them to obtain the same advantage as if they

35. For the first year of the averaging period the individual would be instructed to place a zero in lines 1, 2, and 3 of Schedule L and line 1 of Schedule M. Provision would be made on the return for the allowance of credit for partially exempt interest and for taxes paid to foreign countries and possessions of the United States. Int. Rev. Code Secs. 25(a), 31.

36. This refund together with all payments and refunds for the preceding nine years equals the aggregate tax paid by an individual whose income was \$22,900 in each of the ten years.

37. This is the net cumulative percentage carried forward from line 3 of Schedule M of the preceding return, representing in this case the nine preceding years.

38. This percentage for the current year would be printed on the form in the proper column.

had the privilege of reporting the income or deductions whenever they pleased within the averaging period. The plan would give them the maximum tax advantage since, as a practical matter, there can be no lower tax than on the average income.

The purpose of the plan is to improve the operation of the tax structure and to eliminate manifest inequities in it. Since the tax burden is so heavy, it is particularly important that like incomes should bear a like burden; that no taxpayer and no kind of income should be dis-

criminated against. Moreover, the tax system would be adjusted so that it would interfere as little as possible with business; so that the economy would function actively and efficiently; and so that men would be encouraged to work and to produce.

The Federal Government must impose very heavy taxes for a long time to come. The income tax will, no doubt, be the core of the system. Since income taxes will have to be heavy, great care must be used to see that they are spread as fairly as possible.

Corporation Support of Education

(Continued from page 122)

There are obvious disadvantages in having the unit too large, but the metropolitan areas in which a company owns plants or major offices might well be appropriate.

For concerns doing business on a national or international basis, the regional classification is not so practicable; yet even here a limited number of regions in which the concern has a demonstrable interest, either because of the presence of plants or of highly developed markets, could be set up.

An ingenious solution of the problem of "which college" has been worked out in Indiana. Four colleges (Wabash, Earlham, Hanover and De Pauw) united in a solicitation of local corporations two years ago. Their presidents called jointly on corporation executives and urged consideration of the needs of Indiana colleges as a whole and individually. Subscriptions were invited on the basis of a contribution to any one of the colleges that the corporation might especially favor, or to the group for equal division if no particular college was designated. A substantial amount was received, about half for designated colleges and half for the group. Solicitation was not confined to local concerns; national concerns with local plants were included. The number of co-operating colleges has since been increased.

Similar state organizations have been created in Ohio, Michigan, Minnesota and Oregon, with variations adapted to local conditions, and others are in prospect.


No over-all national fund has yet been developed. The benefit to any but the most far-flung corporation may well be too indirect to make such an organization appealing to corporate givers. But in a more restricted fashion two national organizations are functioning. One is the National Fund for Medical Education, Inc., recently organized by representatives of leading universities, together with the medical profession and a group of distinguished business and public men. It hopes to secure support from business, labor and the public for the seventy-nine approved medical schools of the country. Contributions to such a fund, which are to be allocated by its trustees, fall clearly into a separate classification and avoid the problem of individual selection. And

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public health knows nothing of state or city boundaries. Under today's conditions a lively virus in Texas can quickly cripple an industry in Maine.

The other national fund is the United Negro College Fund. The formula for division of receipts among the thirty-two participants has worked successfully for several years. Any lift that is given to the educational status of the Negro is obviously a national benefit shared by all of us, including corporations.

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The Commission on Financing Higher Education is getting out a handbook with suggestions about the mechanics of contributing support and the avoidance of the discrimination problem. This gives more detail to those interested.

The Modern Philosophy of Pleading

(Continued from page 126)

easy in the preliminary phases of litigation?

SON: I am afraid I do, and it lessens somewhat my enthusiasm for the law as a profession. I must concede it is an easier life for trial lawyers. Lack of discipline has its attractions.

FATHER: This is not for the benefit of lawyers, but for clients! You are getting the wrong slant on it. Techniques prevent clients from getting justice. We must make them so simple the common man may use them or he will not get justice.

SON: Why not dispense with lawyers, and let the judges alone administer justice? Maybe Shakespeare's Dick, the butcher, had something.

FATHER: Heaven forbid!

SON: Has the Supreme Court sanctioned this new philosophy in interpreting its Rules?

FATHER: As I have pointed out, few cases will get to it on pleading questions if the lower courts adopt the new philosophy and postpone or forego decisions on pleading problems. It may occasionally suggest that there was confusion below for failure of the pleadings to show the theory upon which the trial was conducted by separate counts, as Justice Jackson did in a recent case,¹⁴ and it may, by way of an aside, hint that the complaint under the Rules should disclose a cause of action, using that term, as Justice Jackson did, but there has been no actual decision. Lower courts will not change their practices upon such mere dicta, having no fear of reversals. As long as there is no change in the wording of the Rules clearly condemning it, the new philosophy has things pretty well tied up. Our prob-

lem is to get universal adoption of the philosophy by the lower courts, and the decided trend is our way. Most people like an easy way. Wouldn't it make it a lot easier for you if you did not have to study pleading? I advise you to concentrate on summary judgments, discovery, and pretrial procedure.

SON: I know a little about them already. There is no determination of the merits on motion for summary judgments, but only whether there is an issue, unless one of the parties fails to file affidavits meeting those of the other. It is an issue-forming device. To prevent discovery from being turned into a wide open fishing expedition into another's affairs it must be limited by some issues between the parties, and how are you going to know the limiting issues if they are not made by the pleadings? Will not a preliminary narrowing of the issues by the pleading greatly expedite and shorten, if not make wholly unnecessary, a pretrial conference? This is, I am told, being suggested in many of the federal circuits. Are not these other procedures in essence pleadings, supplementary in character, and somewhat less formal?¹⁵ Do you escape disciplines in fact? If a settling of issues before trial is important, because the parties do not in fact know them, is it a simplification of procedure to multiply devices to ascertain them? Is it the true intent of the Federal rules to make summary judgment, discovery and pretrial procedures substitutes for pleading, or to make them available when pleadings prove inadequate to disclose the issues? I note that none of them, except pleading, is compulsory, unless sought by one of the parties. Pleadings seem to be the basic structure for trial preparation. The new philosophy that they

should be a layman's sketch, to be discarded almost as soon as drawn, looks far fetched and ill advised. I am going to see if I can find something by other recognized thinkers to support the grumblings of Justice Jackson.

[Some weeks intervene.]

SON: Dad, I have found some things having an interesting bearing on the new philosophy of pleadings. Judge Clark, when he was still Dean Clark, led the discussion on the recently adopted pleading rules at the American Bar Association's Institute on Federal Rules, held in Cleveland in July, 1938. In opening his discussion he said the Supreme Court had felt it undesirable for members of the Advisory Committee to write books on the subject of the Rules, lest undue weight be given to expressions of opinion by members of the Committee,¹⁶ which seems actually to have happened despite Dean Clark's assertion in these opening remarks that the rules must be con-

14. *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U. S. 384; 70 S. Ct. 200, 205 (1949). The Supreme Court, since the New Rules, constantly refers to the "cause of action" in the complaint. Cf. *Snowden v. Hughes*, 321 U. S. 1; 64 S. Ct. 397. In *Am. Fire & Cas. Co. v. Finn*, 340 U. S. 849; 71 S. Ct. 534 (1951), it clarifies the meaning of "claim for relief" for purposes of removal, referring, of course, to the complaint in state courts. The intimate relation between the "claim" in the state complaint and that in the federal complaint, when removal is involved, would seem to make repeated references to the "cause of action" in the state complaint applicable also to the federal complaint.

15. Fee, "Justice in Search of a Handmaiden", 2 U. of Fla. L. Rev. 175 (1949); Fee, "The Last Horizon of Pleadings Under the Federal Rules of Civil Procedure", 48 Col. L. Rev. 491 (1948). In the Ninth Circuit the Conference of Federal Judges has a committee considering the need of an amendment of Rule 8(a) requiring it to state more clearly that the facts alleged state a cause of action. An interim report recommends the amendment. Reports of Conferences in other circuits state that better pleadings would facilitate pretrial conferences.

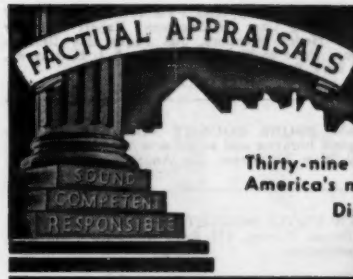
16. Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, 1938, page 195. Cf. remarks of William D. Mitchell, page 179.

strued by the courts themselves. He continued by saying the Committee might be surprised by constructions which would be given, and that he personally would not be surprised if some members of the Committee thought he was carrying his constructions too far, but that he was going to express his opinions anyway, because he believed in them.¹⁷ Probably very few of the Bar and Bench are aware of the Supreme Court's admonition against published opinions on the Rules by Committee members.

What would you think Dad, of Arthur T. Vanderbilt's opinion on the new philosophy concerning interpretation of the Rules?

FATHER: I suspect you have something up your sleeve, but let me have it. He was President of the American Bar Association when the Rules went into effect, said they contained the best experience of the several states in the realm of procedure, and would doubtless become the inspiration for the adoption of similar rules in many jurisdictions, to the great advantage both of lawyers and litigants, but whether that highly desirable result ensued depended in large measure upon the spirit in which the rules were applied in actual litigation.¹⁸ He is for the spirit of reform through simplification. I would say he is one of the distinguished advocates of the new philosophy I have been telling you about, and I dare you to show me anything to the contrary!

SON: Well, dad, you asked for it, and here it is. Mr. Vanderbilt, like Judge Clark, became a judge, as you know. As Chief Justice of the recently reorganized Supreme Court of New Jersey, he led the movement for modernizing New Jersey practice. The Supreme Court carried out the hope he voiced as President of the American Bar Association, and adopted rules of pleading for the superior courts identical with the Federal Rules we have been discussing. Construing a complaint in a case before his court, and reversing a judgment below because of its inadequacy, he says:¹⁹



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The pleadings in the case at bar are lengthy, but the same principles are applicable to them as to the simplest case. The flexibility and seeming informality of pleadings under the new rules should not deceive one into believing that the essentials of sound pleading at law or in equity have been abandoned. Quite the contrary; the objective of reaching an issue of law or of fact in two or at most three simple pleadings has been attained, but not at the sacrifice of stating the elements of a claim or defense. They remain the same as at common law, as a matter of substantive law as well as of good pleading. . . . The grand objective of the movement for simplified procedure by rules of court is the elimination of the interminable prolixity and absurd technicalities of special pleading, which in the days of Baron Parke, gone never to return, made a mockery of substantial justice, not by abandoning stating the essentials of a cause of action or of a defense, but by doing so in "simple, concise and direct terms".

Now, there is what I would call

the spirit of progress, imbibed with judgment and moderation and falling far short of the extravagant claim of the so-called modern philosophy that provisions in rules for simple, concise and ordinary language in pleadings necessarily indicate that pleadings are lowered to the level of the layman. If conformity between state and federal practice is to be brought about by the states adopting the federal rules, the Vanderbilt exposition of them seems far better salesmanship than the spirit of the Clark-Moore philosophy. Don't you think this spirit savors of moonshine?

FATHER: I think that pleading professor of yours has put you up to needing me!

17. Same reference as Note 16, but on page 220.

18. Same reference as Note 16, Foreword.

19. *Grabart v. Society for Establishing Useful Manufactures*, 2 N. J. 136, at 150; 65 A. (2d) 833, at 839-40 (1949).

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